FILE
JUL 27
MICHAEL RODAK, J

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-191

BRUCE BORAAS, ANNE PARISH, MICHAEL TRUMAN, EDWIN DICKMAN and JUDITH DICKMAN,

Plaintiffs-Appellees,

—against—

The VILLAGE OF BELLE TERRE, an incorporated municipality, JAMES PHILBIN, Mayor of the Village of Belle Terre, ROBERT DOERR, Deputy Mayor and Trustee of the Village of Belle Terre, VINCENT BOVE, Trustee of the Village of Belle Terre, VINCENT KARWOWSKI, Trustee of the Village of Belle Terre, and FRANCIS STOLZ, Trustee of the Village of Belle Terre,

Defendants-Appellants.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JURISDICTIONAL STATEMENT

BERNARD E. GEGAN
Attorney for Defendants-Appellants
50 Beacon Hill Road
Port Washington
New York, N. Y. 11050
(516) 883-7873

JAMES J. VON OISTE
Village Attorney, Village of Belle Terre
505 Main Street
Port Jefferson, New York 11777
(516) 473-7676
Of Counsel

TABLE OF CONTENTS

	PAGE
Jurisdictional Statement	1
Opinion Below	2
Jurisdiction	2
Relevant Ordinance Provisions	3
Question Presented	5
Statement of Case	5
The Questions Are Substantial	8
I—Whether preference for traditional family organization is a legitimate governmental objective per se	8
II—Whether the classification in terms of traditional families is rationally related to other legitimate governmental interests	11
CONCLUSION	15
APPENDIX A—Opinion of the Court of Appeals for the Second Circuit	1a
APPENDIX B—Opinion of the District Court for the Eastern District of New York	51a
APPENDIX C—Judgment Appealed From	81a
APPENDIX D—Judgment of the District Court Which Was Affirmed By the Court of Appeals Judgment From Which This Appeal is Taken	83a
APPENDIX E—Notice of Appeal to the Supreme Court of the United States	84a

TABLE OF AUTHORITIES

Cases:	PAGE
Application of Laporte, 2 A.D.2d 710, aff'd 2 N.Y. 2d 921	12
Chicago v. *Atchison, T. & S. F. R. Co.*, 357 U.S. 77	3
Euclid v. *Ambler Realty Co.*, 272 U.S. 365	8, 15
Harman v. *City of Peoria*, 373 Ill. 594	13
Kort v. *City of Los Angeles*, 52 Cal. App. 804	9
Matter of Fox Meadow Estates v. *Culley*, 233 App. Div. 250, aff'd 261 N.Y. 190	10
Nehrbas v. *Incorporated Village of Lloyd Harbor*, 147 N.Y.S.2d 738, aff'd 2 N.Y.2d 190	10
Norwalk Core v. *Norwalk Redevelopment Agency*, 395 F.2d 920	8
Palo Alto Tenants Union v. *Morgan*, 321 F. Supp. 908	13
Robertson v. *Western Baptist Hospital*, 267 S.W. 395 (Ky.)	12
San Antonio Indep. School Dist. v. *Rodriguez*, 36 L. Ed.2d 16	15
Schenectady v. *Alumni Assn.*, 5 A.D.2d 18	12
Slaker v. *O'Conner*, 278 U.S. 188	3
South Carolina Elec. & Gas Co. v. *Flemming*, 351 U.S. 901	3
United Gas Pipe Line Co. v. *Ideal Cement Co.*, 369 U.S. 134	3
United States Dept. of Agriculture v. *Moreno*, 41 U.S.L.W. 5105 (June 25, 1973)	11
Valley View Village v. *Proffett*, 221 F.2d 412	10
Wulfsohn v. *Burden*, 241 N.Y. 288	14

PAGE

Constitution and Statutes:

Fourteenth Amendment, Equal Protection clause 11, 15

28 U.S.C. sec. 1254(2) 3

42 U.S.C. sec. 1983 2

Building Zone Ordinance, Village of Belle Terre 3-5

Other Authorities:

Anderson, *Law of Zoning* 12, 13-14

Gunther, *The Supreme Court 1971 Term, Foreword, In Search of Evolving Doctrine on a Changing Court: A Model for a new Equal Protection*, 86 Harv. L. Rev. 1 (1972) 11

New York Times 8

Stern & Gressman, Supreme Court Practice 3

IN THE

Supreme Court of the United States

October Term, 1973

No.

BRUCE BORAAS, ANNE PARISH, MICHAEL TRUMAN, EDWIN DICKMAN and JUDITH DICKMAN,

Plaintiffs-Appellees,

—against—

The VILLAGE OF BELLE TERRE, an incorporated municipality, JAMES PHILBIN, Mayor of the Village of Belle Terre, ROBERT DOERR, Deputy Mayor and Trustee of the Village of Belle Terre, VINCENT BOVE, Trustee of the Village of Belle Terre, VINCENT KARWOWSKI, Trustee of the Village of Belle Terre, and FRANCIS STOLZ, Trustee of the Village of Belle Terre,

Defendants-Appellants.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the United States Court of Appeals for the Second Circuit, entered on May 1, 1973, affirming a judgment of the United States District Court for the Eastern District of New York declaring unconstitutional and permanently enjoining the enforcement of a portion of the zoning ordinance of the Village of Belle Terre. Appellants submit this Statement

to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinion Below

There was no opinion filed by the Second Circuit Court of Appeals with its final judgment affirming the declaratory judgment and permanent injunction. The opinion on the merits was delivered at an earlier stage in the proceeding when the Court of Appeals reversed the Eastern District Court's denial of a preliminary injunction and remanded the case. This opinion, together with two opinions filed upon the denial of rehearing *en banc*, is reported in 467 F.2d 806. The opinion of the District Court in originally denying the preliminary injunction is unreported. The District Court did not deliver an opinion when, upon remand, it granted the declaratory judgment and permanent injunction.

Jurisdiction

This action was brought by Plaintiffs-Appellees under the Federal Civil Rights Act of 1871, 42 U.S.C. sec. 1983, to declare unconstitutional and enjoin the enforcement of a portion of the one family zoning ordinance of the Village of Belle Terre, New York. The District Court for the Eastern District of New York denied Plaintiff's motion for a preliminary injunction on the ground that the zoning ordinance was constitutional. Plaintiffs appealed to the Court of Appeals for the Second Circuit which on February 27, 1973 found the ordinance unconstitutional and reversed and

remanded for further proceedings consistent with its opinion* (476 F.2d 806). A poll of the active judges resulted in a denial of rehearing *en banc* by an equally divided vote on March 16, 1973, with two opinions—reported with the principal opinions. Upon remand the District Court entered a judgment declaring a portion of the zoning ordinance unconstitutional and permanently enjoining its enforcement. Defendants-Appellants appealed this judgment to the Second Circuit Court of Appeals, which finally affirmed without additional opinion on May 1, 1973.

The appeal to this Court lies under 28 U.S.C. sec. 1254 (2) since the Court of Appeals held a state statute invalid as repugnant to the United States Constitution. A municipal ordinance qualifies as a "state statute" under section 1254 (2) *Chicago* v. *Atchison, T. & S.F. R. Co.*, 357 U.S. 77, 82 (1958); *United Gas Pipe Line Co.* v. *Ideal Cement Co.*, 369 U.S. 134 (1962); Stern & Gressman, Supreme Court Practice 31-32 (1969).

Relevant Ordinance Provisions

Building Zone Ordinance of the Village of Belle Terre

ART. II, *Section DT-1.0.* For the purpose of this Ordinance the Village of Belle Terre will consist of one (1) district to be known as "A" Residence District.

---

* As a precautionary measure Defendants-Appellants filed a notice of appeal to this Court from the above mentioned judgment. Since, however, the granting of a preliminary injunction is not a final judgment for the purpose of appeal to this Court as required by *Slaker* v. *O'Conner*, 278 U.S. 188 (1929) and *South Carolina Elec. & Gas Co.* v. *Flemming*, 351 U.S. 901 (1956), Defendants-Appellants are prosecuting this appeal from the Court of Appeals' final judgment of May 1, 1973, affirming the declaratory judgment of unconstitutionality and permanent injunction.

DT-1.1. The boundary of said district is hereby established as identical to the Village boundaries.

DT-1.2. No building shall be erected, altered, or used and no premises shall be used for any other than a purpose permitted in this "A" residential zone.

ART. III, *Section A-1.0.* "A" Residence District no building or premise shall be used and no building shall hereafter be erected or altered unless provided in this Ordinance except for one (1) or more of the following uses:

(1) One family dwellings

(2) Public parks, playgrounds, recreational areas, and real property and structures owned and operated by the municipality and for municipal purposes of the Village of Belle Terre.

(3) Accessory buildings, including one (1) private garage when located on the same lot and when meeting requirements of Article III, Section A-1.4a: A-1.4b: and A-1.4c and when such buildings are incidental to the principal use of the dwelling and do not include any activity commonly conducted as a business. The private garage may be within or attached to the dwelling.

ART. I, *D-1.34a.* One Family Dwelling. A detached house consisting of or intended to be occupied as a residence by one family only, as family is hereafter defined, in no case shall a lodging house, boarding house, fraternity house, sorority house or multiple dwelling be classified or construed as a one family.

D-1.35a. Family. One or more persons related by blood, adoption or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants. A

number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit though not related by blood, adoption, or marriage shall be deemed to constitute a family.

ART. VIII, *Section M-1.4a(2)*. Each violation of this Ordinance shall constitute disorderly conduct. Every person violating this Ordinance, including the owner . . . and the lessee or tenant of an entire building or structure or premise in which part such violation has been committed or shall exist . . . or any other person who knowingly commits, takes part or assists in any such violation . . . shall be a disorderly person and shall be liable for and pay a penalty not exceeding One Hundred Dollars ($100.00) or by imprisonment for a period not exceeding 60 days or by both such fine and imprisonment. A separate and distinct offense shall be deemed committed on each day during or on which a violation occurs or continues.

Question Presented

Whether six unrelated persons living together as a household have a constitutional right to occupy a one family residence in defiance of a Village zoning ordinance which defines its one family zoning district in terms of a family related by blood, adoption or marriage or, in the alternative, not more than two unrelated individuals.

Statement of Case

Belle Terre is an Incorporated Village of the Fourth Class located on the North Shore of Long Island in Suffolk County, New York. The Village consists of approximately 220 homes inhabited by approximately 700 people.

The Building Zone Ordinance of the Village restricts the use of land to single family houses. Family is defined as follows:

> "One or more persons related by blood, adoption or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants. A number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit though not related by blood, adoption, or marriage shall be deemed to constitute a family."

Plaintiffs, Edwin and Judith Dickman, are the owners of a house in the Village of Belle Terre. Plaintiffs, Bruce Boraas and Michael Truman, are lessees of the Dickman house. Plaintiff, Anne Parish resides in the house. Three other persons, not plaintiffs in this action also live in the house. All six are students at the State University of New York at Stony Brook. None of the six residents of the Dickman house is related to any of the others by blood, adoption or marriage. Both the University and the Village are located wholly within the Town of Brookhaven (population 250,000) whose zoning would permit plaintiffs occupancy.

On July 19, 1972, the plaintiffs, Edwin and Judith Dickman, were served with a Criminal Summons returnable before the Village Justice on July 28, 1972, charging them with a violation of the one-family Zoning Ordinance. Because the Summons was served without having been preceded by a 48 Hour Notice of Violation from the Village Building Inspector, the Village Counsel temporarily withdrew the Summons on July 28, 1972. This was followed on July 31, 1972, by service upon the plaintiffs, Edwin and Judith Dickman, by the Village Building Inspector of the

48 Hour Order to Correct Violation. On August 2, 1972, the present action was begun by the plaintiffs in the Eastern District Court, for an injunction and a judgment declaring the zoning ordinance unconstitutional. On September 20, 1972, the District Court per Dooling, *D.J.*, denied a motion for a preliminary injunction in a decision upholding the validity of the ordinance because of the state interest in protecting and fostering the traditional family pattern through zoning limiting some areas to single family occupancy. The Plaintiff students appealed the denial of the preliminary injunction to the Second Circuit Court of Appeals, which reversed and remanded. That Court found that the goal of preference for traditional family organization through zoning "fails to fall within the proper exercise of state police power" (476 F.2d at 815). The Court of Appeals found in addition that the distinction between related families and unrelated groups could not be proved to promote traditional physical zoning objectives, such as control of population density, traffic congestion and property values. On remand the District Court entered a final judgment declaring the relevant portion of the ordinance unconstitutional and permanently enjoining its enforcement. In order to procure finality the Village appealed to the Second Circuit Court of Appeals which, in light of its prior determination, summarily affirmed the declaratory judgment and injunction on May 1, 1973. From this judgment the Village and the individual defendants appeal to this Court.

The Questions Are Substantial

The decision of the Court of Appeals in this case constitutes the most sweeping judicial invasion into local autonomy in land use policy since zoning was first discussed by this Court forty-seven years ago, *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926). Ironically, this has occurred in a case wholly lacking in those overtones of race or class exclusion which have been coming before the lower courts in recent years. E.g., *Norwalk Core* v. *Norwalk Redevelopment Agency*, 395 F.2d 920 (2d Cir. 1968). The practical implications of such judicial intervention have attracted widespread public attention (E.g., New York Times, Feb. 28, 1973, p. 34; New York Times, March 4, 1973, p. 58B) and caused Judge Timbers, in his dissent, to note the "radiations far beyond the immediate controversy. . . ." (476 F.2d at 819).

I

Whether preference for traditional family organization is a legitimate governmental objective per se.

The first substantial legal point presented by the decision below concerns the goals that local zoning power may legitimately aim for. While the Village contends that the family classification is relevant to unchallenged zoning purposes of density control, traffic congestion and property value, to be discussed subsequently, the District Court and the Court of Appeals differed sharply on whether zoning may legitimately have the social purpose of fostering and preferring the traditional family as such. While the District Court sustained the ordinance principally on this

basis, the Court of Appeals stated that "such a goal fails to fall within the proper exercise of state police power" (476 F.2d at 815).

Appellants submit that this *ipse dixit* finds no sanction in the Constitution and is thoroughly inconsistent with our tradition of bounties and protections with which, as Judge Dooling in the District Court put it "the states, and all of them, and the Federal Government alike aggressively surround the traditional family of parents and children, reaching from family court laws, through laws of inheritance to tax law." (Appendix B, p. 74a).

If one of those bounties is the creation of single family zoning districts within large cities and towns or, as here, the incorporation of tiny family villages within larger township units, there is nothing unusual or discriminatory in the existence of the sheltered and tranquil family environment so created. This constitutes a legal benefit and preference for family organization and is justified as one among many applications of state solicitude. Clearly, the solicitude toward the family cannot be construed as hostility towards other land uses. Judge Dooling so concluded in stating: "The essence of zoning is that its selection is not regarded as invidiously discriminatory against uses not selected. *Cf. Kort* v. *City of Los Angeles*, C.A. Cal. 1942, 52 Cal. App. 804, 127 Pac.2d 66, 70. Zoning presupposes that convenient and fitting locations can be found for every legitimate land use, so that no pursuit of any use is denied, or disparaged." (Appendix B, p. 80a). This conclusion is demonstrably applicable to this case, in which Belle Terre is but a tiny outpost in the Town of Brookhaven (population 250,000) which has several zoning districts, even the

highest of which, as the District Court determined, would permit the students' domestic arrangement (Appendix B, p. 58a).

Judge Dooling recognized that "zoning exclusions could, no doubt, be carried to the point of unconstitutional deprivation of right simply by selection." (Appendix B, p. 75a). The single zone which the Village constitutes was held proper "in view of its small size and apparent state of development. It is not claimed that the Village was, as it were, gerrymandered into existence so that it could be a single district village." (Appendix B, p. 76a). This accords with all available authority. *Matter of Fox Meadow Estates* v. *Culley*, 233 App. Div. 250, 252 N.Y.S. 178, aff'd 261 N.Y. 506 (1931); *Nehrbas* v. *Incorporated Village of Lloyd Harbor*, 147 N.Y.S. 2d 738, modified 1 A.D.2d 1034, 152 N.Y.S. 2d 738, aff'd 2 N.Y. 2d 190 (1957); *Valley View Village* v. *Proffett*, 221 F. 2d 412 (6th Cir. 1955).

The Court of Appeals "universalized" the Belle Terre ordinance instead of accepting it for what it is—a tiny island of one family zoning in an ocean of permissively zoned area. The Court reasoned that if the Belle Terre ordinance were upheld all other communities might adopt similar laws, leaving groups such as Appellees with no place to live. Putting to one side the wholly speculative nature of this supposition, a contrary decision in this case would not justify any such sweeping suppression of unrelated group living arrangements. Belle Terre, because of its small size, is constituted wholly as a one family district. Larger communities, such as the Town of Brookhaven in which Belle Terre is situated, have multi-district zoning comprised of one and two family, multiple dwelling, com-

mercial and industrial. A decision that a municipality may reasonably limit the number of unrelated individuals who may aggregate together under one roof in a one family district does not justify excluding them from other districts not limited to single family occupancy. The line would thus be easy to draw and would not involve the exclusionary consequences envisioned by the Court of Appeals.

II

Whether the classification in terms of traditional families is rationally related to other legitimate governmental interests.

The first point of note is that the Court of Appeals departed from the traditional rational basis test altogether. Without characterizing the students' claimed right as "fundamental", the Court nevertheless took its lead from a recent article (Gunther, The Supreme Court 1971 Term, Foreword, In Search of Evolving Doctrine on a Changing Court: A Model for a New Equal Protection, 86 Harv. L. Rev. 1 (1972)) and opted for "a more flexible and equitable approach, which permits consideration to be given to evidence of the nature of the unequal classification under attack, the nature of the rights adversely affected, and the governmental interest urged in support of it." (476 F.2d at 814). This alone is a significant shift in doctrine in a major area of constitutional law. That the traditional rational basis test of equal protection is the appropriate one is demonstrated by the recent case of *United States Dept. of Agriculture* v. *Moreno*, 41 U.S.L.W. 5105 (June 25, 1973) which also involved the right of unrelated individuals to live together. Although that case struck down a portion

of the Food Stamp Act which denied stamps to households composed of unrelated persons, Defendants-Appellants cite it as a precedent in their favor here because it applies the established rational basis test to a classification impinging on the same type of rights as those asserted by the Students. The actual holding is not adverse to our position because of the differences in purpose between food stamp distribution and zoning. A family classification not rationally related to nutritional needs becomes highly relevant to land use considerations.

Were no distinction to be drawn between a genuinely related family versus unrelated individuals desiring to live together as a sort of commune, the zoning objectives of density control, preservation of neighborhood character, and control of rental values would be frustrated. These objectives form not only a rational basis for zoning but part of its essential reason for being Anderson, American Law of Zoning, Sections 7.01, 7.06, 7.08 et seq.

In the absense of a distinction between blood relatives and others, the Courts have quite properly construed zoning ordinances strictly against the municipality and in favor of the property owner. For example, in New York, although the Appellate Division, Second Department, has held that 23 college students living together did not constitute a family *Schnectady* v. *Alumni Assn.*, 5 A.D. 2d 18, 168 N.Y.S. 2d 754 (1957), the Third Department has held that 60 students living together constituted a family (*Application of Laporte*, 2 A.D. 2d, 710, 152 N.Y.S. 2d 916, Aff'd 2 N.Y. 2d 921 (1956). Other jurisdictions have experienced similar difficulties with open-ended definitions of "family" *Robertson* v. *Western Baptist Hospital*, 267 S.W.

2d 395 (Ky. 1954), (20 nurses sharing one residence held to be a family). Indeed, the unlimited number of strangers who might live together as a "family" under an Illinois ordinance resulted in the Court striking down the ordinance's prohibition on multiple dwelling units within a building. If numerous strangers may live together it is arbitrary to prevent them from living separately, *Harman* v. *City of Peoria*, 373 Ill. 594, 27 N.E. 2d, 525 (1940).

Thus, it may be seen that a municipality's right to regulate boarding house uses and other density problems is meaningless without some restriction on the number of unrelated individuals who may live together in a dwelling. The fact that no numerical limit is imposed upon the number of blood relatives who may constitute a family does not introduce an irrational or discriminatory distinction. The number of children, brothers, uncles, grand-parents or other relatives who may be added to the conventional family unit tends to be self-limiting. This fact, together with a laudable wish not to intrude on a valued social institution accounts for the absence of a numerical limit on conventional family occupancy. No self-limiting factor, no built-in institutional restraint applies to communal living by unrelated individuals. To the contrary, the property owner's profit motive pushes strongly in the other direction.

The privileged legal position of traditional families is well stated in *Palo Alto Tenants Union* v. *Morgan*, 321 F. Supp. 908, at 911:

> "But there is a long recognized value in the traditional family relationship which does not attach to the "voluntary family". The traditional family is an institution reinforced by biological and legal ties which are difficult, or impossible to sunder. It plays

> a role in educating and nourishing the young which, far from being "voluntary", is often compulsory. Finally, it has been a means, for uncounted millenia, of satisfying the deepest emotional and physical needs of human beings. A zoning law which divided or totally excluded traditional families would indeed be "suspect". The communal living groups represented by plaintiffs share few of the above characteristics. They are voluntary, with fluctuating memberships who have no legal obligations of support or cohabitation. They are in no way subject to the State's vast body of domestic relations law. They do not have the biological links which characterize most families. Emotional ties between commune members may exist, but this is true of members of many groups. Plaintiffs are unquestionably sincere in seeking to devise and test new life-styles, but the communes they have formed are legally indistinguishable from such traditional living groups as religious communities and residence clubs. The right to form such groups may be constitutionally protected but the right to insist that these groups live under the same roof, in any part of the city they choose, is not".

In the case of unrelated groups, greater density (especially of individuals leading separate lives) means separate car ownership, traffic and parking congestion, and other problems of intensity of land use. As the *Palo Alto Tenants Union* case emphasized, voluntary association of persons with no binding ties constitute a more potentially transient population. (Note that 4 of the 6 present occupants of the Dickman houses are not on the lease) similar to hotel, motel and boarding house uses—all of which affects the residential integrity of the area, and consequently, property values. *Wulfsohn* v. *Burden*, 241 N.Y. 288 (1925); Anderson,

American Law of Zoning, Sec. 7.25. Consequently, the concern of the Village expressed in this Ordinance cannot be dismissed as irrational or unrelated to legitimate zoning policies.

To say, as the Court of Appeals did, that the problems associated with unrelated group occupancy are "rank speculation, unsupported either by evidence or by facts that could be judicially noticed" (476 F.2d at 816) departs radically from the presumption of validity traditionally associated with the rational basis test used with the equal protection clause. The question before the Court is not whether the lawmakers can prove the factual basis underlying the statute; but whether the challenger can demonstrate "that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 395 (1926). Accord, *San Antonio Independent School Dist.* v. *Rodriguez*, 36 L. Ed.2d 16 (1973).

CONCLUSION

The power of a municipality to distinguish between family living and other types of multiple occupancy by unrelated individuals must be acknowledged if the well established zoning distinction between one family and multiple dwelling districts is to remain viable. The decision below implicitly challenges the right of a locality to continue to make this distinction. The impact is obvious and far reaching. The decision necessitates an inquiry into basic questions of what the legtimate purposes of zoning may include and the existence and scope of the rights of domestic association

claimed by Appellees—as well as the appropriate criteria in an equal protection analysis. Because of the actual consequences for large numbers of individuals and localities and the disputed constitutional issues Appellants respectfully request that probable jurisdiction be noted.

Respectfully submitted,

BERNARD E. GEGAN
Attorney for Defendants-Appellants
50 Beacon Hill Road
Port Washington
New York, N. Y. 11050
(516) 883-7873

JAMES J. VON OISTE
Village Attorney, Village of Belle Terre
505 Main Street
Port Jefferson, New York 11777
(516) 473-7676
Of Counsel

APPENDIX A

Opinion of the Court of Appeals for the Second Circuit

BRUCE BORAAS et al.,

Plaintiffs-Appellants,

v.

The VILLAGE OF BELLE TERRE, an incorporated municipality, et al.,

Defendants-Appellees.

No. 372, Docket 72-2040

United States Court of Appeals,
Second Circuit.

Argued Oct. 19, 1972.

Decided Feb. 27, 1973.

Rehearing En Banc

Denied March 16, 1973

Opinion Dissenting From Denial of Rehearing En Banc April 5, 1973.

Reversed and remanded.

Timbers, Circuit Judge, filed dissenting opinion.

From denial of rehearing en banc, Chief Judge Friendly and Circuit Judges Hays, Mulligan and Timbers dissented; Circuit Judge Timbers filed opinion dissenting from denial of rehearing en banc.

Before MANSFIELD, OAKES and TIMBERS, Circuit Judges.

Appendix A—Opinion of the Court of Appeals for the Second Circuit

MANSFIELD, Circuit Judge:

At issue upon this appeal is the constitutionality of a zoning ordinance of the incorporated Village of Belle Terre, New York, which prohibits groups of more than two (2) unrelated persons, as distinguished from traditional families consisting of any number of persons related by blood, adoption, or marriage, from occupying a residence in an area zoned for "one-family" occupancy. We held that since the discriminatory classification is unsupported by any rational basis consistent with permissible zoning law objectives, it transgresses the Equal Protection Clause. The district court's decision denying preliminary injunctive relief against enforcement of the ordinance is reversed.

Plaintiffs Edwin and Judith Dickman, owners of a house in Belle Terre, a suburban municipality with approximately 700 residents occupying some 220 homes in Suffolk County, New York, have rented their six-bedroom, single-family residence for occupancy to plaintiffs Bruce Boraas, Anne Parish and Michael Truman, all students at the State University of New York at Stony Brook, located seven or eight miles away, and to three other students attending the same university who are not parties to the instant action. The premises were originally leased on or about December 31, 1971, by plaintiff Truman as lessee for a term ending May 31, 1973, at a monthly rental of $500. Plaintiff Boraas later became a co-signer of the lease on the same terms.

None of the six student occupants is related. Each occupies one of the six bedrooms and pays a portion of the rent. The six are organized and function as a single housekeep-

ing unit insofar as they use the common cooking facility, dine together and share housekeeping, "yard" chores, and a "house" checking account from which disbursements for necessary household expenses are made. It is conceded that all of the occupants have behaved in a responsible manner, and no immoral conduct on their part is suggested. Four of them are pursuing graduate studies in sociology at Stony Brook.

Plaintiffs assert that before leasing the Belle Terre residence from the Dickmans they looked extensively for alternatives to traditional dormitory living, which admittedly are available. Conventional apartment rentals, where available, however, were found to be beyond their means and a cooperative housing arrangement was considered by them to be pleasant, convenient, promotive of scholarly exchange, and within their pocketbooks.

The village of Belle Terre, which consists of approximately 220 homes, is zoned exclusively for residence in one-family dwellings.[1] A "family" is defined as:

> "One or more persons related by blood, adoption or marriage, living and cooking together as a single housekeeping unit . . . a number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit though not related by

[1] A one-family dwelling is defined as:

> "A detached house consisting of or intended to be occupied as a resdence by one family only, as family is hereafter defined. In no case shall a lodging house, boarding house, fraternity house, sorority house or multiple dwelling be classified or construed as a one family dwelling." Building Zone Ordinance of the Village of Belle Terre, Art. I, § D-1.34a (1971).

> blood, adoption, or marriage shall be deemed to constitute a family." The Building Zone Ordinance of the Village of Belle Terre, Art. I, § D-1.35a (June 8, 1970).

To enforce the zoning code the ordinance further provides:

> "Each violation of this ordinance shall constitute disorderly conduct. . . . [Persons] shall be liable for and pay a penalty not exceeding One Hundred Dollars ($100.00) or by imprisonment for a period not exceeding 60 days or by both such fine and imprisonment. A separate and distinct offense shall be deemed committed on each day during or on which a violation occurs or continues." Building Zone Ordinance of the Village of Belle Terre, Art. VIII, Part 4, § M-1.4a(2) (Oct. 17, 1971).

On June 8, 1972, Boraas and Truman were denied residents' beach passes because the ordinance allegedly considered them "illegal residents."[2] On July 19, 1972, the Dickmans, the owners-lessors, were served with a summons returnable before the Village Justice on July 28, 1972. However, because the Village Code required a 48-hour notice of violation, which had not been complied with, the summons was withdrawn. On July 31, 1972, the Dickmans were served with the required "Order to Remedy Violations" which notified plaintiffs that failure to remedy the condition might subject them to liability commencing on August 3, 1972.

---

[2] Plaintiffs assert that this was the explanation given by one of the individual defendants, Francis R. Stolz, a Trustee of the Village. Other named defendants are James Philbin, Mayor of the Village, Robert Doerr, Deputy Mayor and Trustee, Vincent Bove, Trustee, and Vincent Karwowski, Trustee.

Appendix A—Opinion of the Court of Appeals for the Second Circuit

On August 2, 1972, plaintiffs commenced an action in the district court under the federal Rights Act of 1871, 42 U.S.C. § 1983, against appellees, who are the Mayor and Trustees of Belle Terre, seeking preliminary and permanent injunctive relief against enforcement of the ordinance and a declaratory judgment invalidating as unconstitutional the prohibition against residential occupancy by more than two persons "not related by blood, adoption, or marriage." [3] Jurisdiction was ground on 28 U.S.C. §§ 1331(a), 1343, and 2201. Pending a hearing on the constitutional issues, Judge Dooling issued a temporary restraining order.

Following a hearing on plaintiffs' motion for a preliminary injunction, Judge Dooling on September 20 issued a 40-page decision and order denying the motion for a preliminary injunction and upholding the validity of the ordinance. A temporary restraining order was continued for five days to enable plaintiffs to seek a stay pending appeal, which was granted by this Court on September 27, and thereafter extended to the date of our decision and mandate.

In his carefully considered opinion Judge Dooling decided that he was not precluded from reaching the merits by Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d

[3] Specifically, the complaint allaged that the ordinance denied the plaintiffs' equal protection of the law, violated their right of association as secured by the First and Fourteenth Amendments, intruded on their constitutionally protected right of privacy, and contravened their right to travel. On appeal, the primary reliance has been on the equal protection claim at least insofar as the ordinance allegedly impinged unequally on the other specified constitutional rights.

669 (1971), its brethren, or by the anti-injunction statute, 28 U.S.C. § 2283 (1965), and that abstention was not appropriate for the reason that the New York decisional law clearly indicated that the zoning ordinance would be deemed an exercise of power granted by New York's enabling legislation, N.Y. Village Law §§ 175, 177. See, e. g., City of Schenectady v. Alumni Association of Union Chapter, 5 A.D.2d 14, 168 N.Y.S. 2d 754 (3d Dept. 1957). Recognizing that plaintiffs had the "unquestionable right to live together in student groupings," free from unwarranted public intrusions, just as traditional families had the right to live in areas restricted to one-family dwellings, he summarized the issue before the court as follows:

> "The question ultimately posed is whether it is lawful to have a one-family dwelling zone district which excludes equally small household groups who impose no greater burdens of use on the land, the building or the surrounding than a blood-and-marriage family group on the simple and bare ground that such student groups are not families made up of husband, wife and children." (A. 73a).

Judge Dooling concluded that the exclusionary classification could not be upheld on traditional grounds supporting zoning regulations as a valid exercise of state police power, see Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926), because it did not promote "such familiar zoning objectives as safety, adequate light and air, preservation of the land from overintensive use, avoiding crowding of the population, reduction of traffic congestion and facilitation of adequate transportation, water, sewer-

age, school, park and other public services." (A. 77a). However, he decided that the ordinance represented a lawful exercise of a "legally protectable affirmative interest" in the family made up of married parents and children, i. e., the traditional "marriage-and-blood-related" families of the type presently occupying Belle Terre. Holding that the interest of such traditional families in maintaining uses of the same character in the community is a "proper zoning consideration," he described "[s]uch zoning [as] simply another of countless statutes of bounty and protection with which the states, and all of them, and the Federal government alike aggressively surround the traditional family of parents and their children, reaching from family court laws, through laws of inheritance to tax laws." (A. 77a).

In reaching its decision the district court gave weight to the smallness of the Belle Terre community, the absence of similar restrictive or exclusionary classifications in some nearby communities, and the existence of dormitory facilities at Stony Brook itself. Appellants here seek reversal on the ground that the Belle Terre zoning ordinance impinges upon their constitutional rights of privacy and association.

Procedural Questions

[1] Although we are faced at the outset with a number of procedural questions, we agree with the district court that none of them precludes consideration of the merits. Since the Belle Terre ordinance was not of state-wide applicability, the statutory requirement for consideration by a three-judge court, 28 U.S.C. § 2281, has no application.

> "The court has consistently construed the section [2281] as authorizing a three-judge court not

merely because a state statute is involved but only when a *state statute of general and statewide application* is sought to be enjoined." Moody v. Flowers, 387 U.S. 97, 101, 87 S.Ct. 1544, 1548, 18 L.Ed.2d 643 (1967); see Ex parte Collins, 277 U.S. 565, 48 S.Ct. 585, 72 L. Ed. 990 (1928). (Emphasis supplied.)

[2] We further conclude that Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), and its brethren,[4] which held that in the absence of extraordinary circumstances threatening irreparable injury federal injunctive or declaratory relief should not issue when a prosecution is pending in a state court against the federal plaintiff, do not preclude federal equitable intervention, at least under the facts of this case. See Thoms v. Heffernan, No. 72-1013, 473 F.2d 478 (2d Cir. 1973); Note, Implications of the Younger Cases for the Availability of Federal Equitable Relief When No State Prosecution is Pending, 72 Column.L.Rev. 874; Hull v. Petrillo, 439 F.2d 1184, 1186 n.1 (2d Cir. 1971). Cf. Abele v. Markle, 452 F.2d 1121 (2d Cir. 1971). As of August 2, 1972, the date of the initiation of the federal suit, no state case was pending; in fact no liability attached until August 3, 1972.

[3] We are also persuaded that a justiciable controversy is presented. Neither *Younger*, nor Boyle v. Landry, 401

---

[4] Boyle v. Landry, 401 U.S. 77, 91 S.Ct. 758, 27 L.Ed.2d 696 (1971); Samuels v. Mackell, 401 U.S. 66, 91 S.Ct. 764, 27 L.Ed. 2d 688 (1971); Perez v. Ledesma, 401 U.S. 82, 91 S.Ct. 674, 27 L.Ed.2d 701 (1971); Dyson v. Stein, 401 U.S. 200, 91 S.Ct. 769, 27 L.Ed.2d 781 (1971); Byrne v. Karalexis, 401 U.S. 216, 91 S.Ct. 777, 27 L.Ed.2d 792 (1971).

U.S. 77, 91 S.Ct. 758, 27 L.Ed.2d 696 (1971), precludes a showing of such a controversy. See Thoms v. Heffernan, No. 72-1013, 473 F.2d 478 (2d Cir. 1973); Abele v. Markle, 452 F.2d 1121 (2d Cir. 1971). Here the denial of the beach passes and the service of the notice of July 28 overcome any justiciability barrier.

[4, 5] It is further settled that the anti-injunction statute, 28 U.S.C. § 2283[5] does not bar enjoining *future* state court proceedings, Dombrowski v. Pfister, 380 U.S. 479, 484 n.2, 85 S.Ct. 1116, 14 L.Ed.2d 22, (1965); see Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), and that 42 U.S.C. § 1983 constitutes a congressionally carved out exception to the anti-injunction statute. Mitchum v. Foster, 407 U.S. 225, 92 S.Ct. 2151, 32 L.Ed.2d 705 (1972).

[6] Finally, we agree with Judge Dooling that absention is not warranted. We are not here confronted with a situation where state court resolution of an unclear state statute might obviate the necessity to decide federal constitutional questions. See Railroad Commission v. Pullman Co., 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941). It is unlikely that New York courts would find Belle Terre's zoning ordinance *ultra vires* the state enabling legislation, N.Y. Village Law, §§ 175, 177 (McKinney 1966), since

---

[5] The "Anti-Injunction" statute provides:

> "A court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283 (1965).

similar zoning classifications grounded on the concept of "natural families" have been sustained. See, e.g., City of Schenectady v. Alumni Association of Union Chapter, 5 A.D.2d 14, 168 N.Y.S.2d 754 (3d Dept. 1957). Moreover, as Judge Dooling noted:

> "In the present case a state court decision holding that the ordinance, construed as the village has construed it, was beyond the authority granted to the village by the New York Village Law, could apparently be based only on the argument that to hold otherwise would impose on . . . the Village Law an unconstitutional interpretation. Any unresolved question of the state law detectable here is, therefore, the federal question differently stated." Cf. Wisconsin v. Constantineau, 400 U.S. 433, 438-439, 91 S. Ct. 507, 27 L.Ed.2d 515 (1971).

The Merits

Turning to the merits, it is undisputed that the Belle Terre zoning ordinance restricts appellants in the exercise of their rights with respect to the use of land in the Village and that it is discriminatory and unequal to the extent that, while traditional families of more than two members may occupy a one-family dwelling, groups of more than two unrelated individuals (sometimes described as "voluntary" families) are prohibited from doing so. The basic issue before us is whether this unequal legislative classification violates the Equal Protection Clause.

[7] In approaching that issue we start on the premise that almost every local zoning ordinance represents a re-

striction upon citizens' freedom of action in the exercise of otherwise lawful and constitutional rights with respect to the use of their land, whether it be in the operation of a business or the construction of a home. Where such regulations represent a valid exercise of delegated state police power and are designed to promote or protect the public health, safety or welfare, the individual's right must give way to the particular concern of the community, Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S. Ct. 114, 71 L.Ed. 303 (1926); Zahn v. Board of Public Works, 274 U.S. 325, 47 S.Ct. 594, 71 L.Ed. 1074 (1927); Nectow v. City of Cambridge, 277 U.S. 183, 48 S.Ct. 447, 72 L.Ed. 842 (1928); cf. Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 57 S.Ct. 868, 81 L.Ed. 1245 (1937).

[8-11] The right of an individual or of a group, related or otherwise, to live together does not necessarily guarantee complete freedom as to the location, construction, or living conditions, without regard to reasonably based zoning laws. In enacting zoning legislation the local authorities are vested with broad discretion. Ordinarily a court will intervene to declare a zoning ordinance to be a denial of due process only where it cannot be supported by a substantial public interest. Traditionally it may be justified by showing that it is related to such matters as safety, population density, adequacy of light and air, noise and necessity for traffic control, transportation, sewerage, school, park and other public services. More recently, promotion of the aesthetic aspects of a town has been upheld as a legitimate zoning objective, e.g., United Advertising Corp. v. Borough of Metuchen, 42 N.J. 1, 198 A.2d 447 (1964).

From the very outset of its consideration of the constitutionality of local zoning laws, which were then attacked under the Due Process Clause, the Supreme Court laid down a basic principle:

> "The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited, and, other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare." Nectow v. City of Cambridge, 277 U.S. 183, 188, 48 S.Ct. 447, 448, 72 L.Ed. 842 (1928).

[12] To the requirement that zoning laws satisfy due process, as thus enunciated by *Euclid* and its brethren, there must be added the important condition that they not discriminate in violation of the Equal Protection Clause. While some inequalities may be tolerated, Williamson v. Lee Optical Co., 348 U.S. 483, 75 S.Ct. 461, 90 L.Ed. 563 (1955), a law which might otherwise be upheld as a valid exercise of police power will be struck down where it classifies on the basis of impermissible criteria, such as race. Reitman v. Mulkey, 387 U.S. 369, 87 S.Ct. 1627, 18 L.Ed.2d 830 (1967); Kennedy Park Homes Association v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970), cert. denied, 401 U.S. 1010, 91 S.Ct. 1256, 28 L.Ed.2d 546 (1971).

Turning to the present case, appellants urge that since the Belle Terre ordinance impinges upon constitutionally protected rights and interests characterized by them as "fundamental," i.e., their rights of privacy, of association

and of travel, as well as their freedom to live with whom they please, cf. Eisenstadt v. Baird, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972); Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), the challenged legislation must be struck down for the reason that it is not shown to be supportable by a "compelling state interest." See Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969). Appellees, on the other hand, argue that if, upon judicial hypothesis, any state of facts might be conceived of which would indicate a rational zoning basis for the ordinance, it must be sustained. Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911), 31 S. Ct. 337, 55 L.Ed. 369; McGowan v. Maryland, 366 U.S. 420, 426, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961). They suggest that since the ordinance might conceivably be justified as a measure designed to curb population density and excessive rental costs, or to preserve the traditional family character of the neighborhood, it must be upheld.

With respect to appellants' contention that the rights invoked by them should be classified as "fundamental," we note that the interests thus identified by the Supreme Court have been few in numbers. They include the right to travel, Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed. 2d 600 (1969), the right to vote, Dunn v. Blumstein, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972); Harper v. Virginia Board of Elections, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966), and the right to the essential facilities for prosecution of a criminal appeal, Griffin v. Illinois, 351 U.S., 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956). Despite vigor-

ous efforts to extend the characterization into other fields, including exclusionary zoning,[6] the list of so-called "fundamental" rights has not been expanded. At its last term the Supreme Court declined to classify as "fundamental" the right to housing, Lindsey v. Normet, 405 U.S. 56, 92 S.Ct. 862, 31 L.Ed.2d 36 (1972), and reaffirmed its similar views with respect to welfare payments, Jefferson v. Hackney, 406 U.S. 535, 546, 92 S.Ct. 1724, 32 L.Ed.2d 285 (1972); Richardson v. Belcher, 404 U.S. 78, 81, 92 S.Ct. 254, 30 L.Ed.2d 231 (1971); Dandridge v. Williams, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970).

Unquestionably the rights claimed by appellants are important. Certainly they are more personal and basic in nature than those of commercial interests of the type under consideration in *Lindsley, supra*, and *McGowan, supra*. On the other hand, this case does not present us with discrimination against racial minorities or the poor. Note, The Equal Protection Clause and Exclusionary Zoning After Valtierra and Dandridge, 81 Yale L.J. 61 (1971); Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (2d Cir. 1968). Nor does the present case fit snugly into any of the other categories recognized as requiring application of the compelling state interest test. Despite the incidental effects of the Belle Terre ordinance, we are not here dealing with a "suspect" classification such as race,

---

[6] Note, The Equal Protection Clause and Exclusionary Zoning After Valtierra and Dandridge, 81 Yale L.J. 61 (1971); Sager, Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent, 21 Stan.L.Rev. 767 (1969); Comment, All In The "Family": Legal Problems of Communes, 7 Harv.Civ.Rights —Civ.Lib.L.Rev. 393 (1972).

Loving v. Virginia, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967), or alienage, Graham v. Richardson, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971), or with a law directed against a right of association sought as a means of political expression or action, e. g., NAACP v. Alabama, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958); Shelton v. Tucker, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231 (1969); Bates v. Little Rock, 361 U.S. 516, 80 S.Ct. 412, 4 L.Ed.2d 480 (1960), or as a means of obtaining access to the courts, NAACP v. Button, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963).

[13-16] It may be that the underlying purpose of the Belle Terre statute is to regulate the intimate moral behavior of its residents within their "zone of privacy," Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); Eisenstadt v. Baird, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972); Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), and that its effect has been to curb the right to travel of those who wish to live in Belle Terre. Shapiro v. Thompson, 394 U.S. 617, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969). Belle Terre, however, claims that these are not purposes of its zoning law. Fortunately we do not have to decide whether there has been an infringement of the right of privacy or travel because we believe that we are no longer limited to the either-or choice between the compelling state interest test and the minimal scrutiny permitted by the *Lindsley-McGowan* formula. Faced recently with the issue under similar circumstances the Supreme Court appears to have moved from this rigid dichotomy, sometimes described as a "two-tiered"

formula,[7] toward a more flexible and equitable approach, which permits consideration to be given to evidence of the nature of the unequal classification under attack, the nature of the rights adversely affected, and the governmental interest urged in support of it. Under this approach the test for application of the Equal Protection Clause is whether the legislative classification is *in fact* substantially related to the object of the statute. Eisenstadt v. Baird, 405 U.S. 438, 446-455, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972); Reed v. Reed, 404 U.S. 71, 76, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971), see James v. Strange, 407 U.S. 128, 140-141, 92 S.Ct. 2027, 32 L.Ed.2d 600 (1972); Jackson v. Indiana, 406 U.S. 715, 723-730, 92 S.Ct. 1845, 32 L.Ed.2d 285 (1972); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 172-176, 92 S.Ct. 1396, 31 L.Ed.2d 768 (1972). This approach is suggested by language of Royster Guano Co. v. Virginia, 253 U.S. 412, 415, 40 S.Ct. 560, 64 L.Ed. 989 (1920), and of a distinguished commentary, e.g., Tussman & tenBroek, The Equal Protection of the Laws, 37 Cal.L.Rev. 341, 344-353, 365-368 (1949). If the classification, upon review of facts bearing upon the foregoing relevant factors, is shown to have a substantial relationship to a lawful objective and is not void for other reasons, such as overbreadth, it will be upheld. If not, it denies equal protection.

> "A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circum-

[7] See Gunther, The Supreme Court 1971 Term, Foreword, In Search of Evolving Doctrine on a Changing Court: A Model for a New Equal Protection, 86 Harv.L.Rev 1, 10-20 (1972).

> stanced shall be treated alike.' Royster Guano Co. v. Virginia, 253 U.S. 412, 415, 40 S.Ct. 560, 64 L.Ed. 989 (1920). The question presented by this case, then, is whether a difference in the sex of competing applicants for letters of administration bears a rational relationship to a state objective that is sought to be advanced by the operation of §§ 15-312 and 15-314.
>
> * * * * *
>
> "The crucial question, however, is whether § 15-314 advances that objective in a manner consistent with the command of the Equal Protection Clause. We hold that it does not." Reed v. Reed, 404 U.S. 71, 76, 92 S.Ct. 251, 254, 30 L.Ed.2d 225 (1971).

In thus being required to focus on the actual rationality of the legislative means under attack, we are asked to do what courts are historically suited to do—apply the law to factual contexts rather than accept one hypothetical legislative justification to the exclusion of others that represent the true rationale of the classification.[8] This more realistic judicial

---

[8] We disagree with our Brother Timbers' interpretation of our decision as requiring the court to apply a flexible standard based upon balancing of the importance of the respective conflicting governmental and private interests affected by the legislation under review. We believe simply that the court is required to determine whether the legislative classification *in fact* (rather than hypothetically) has a substantial relationship to a lawful objective. That determination of necessity requires the court to consider evidence of the nature of the classification under attack, the rights adversely affected and the governmental interest in support of it.

We agree with Judge Timbers' conclusion that in determining whether legislation under review denies equal protection "grossly overinclusive or underinclusive classifications should not be readily tolerated." However, for reasons stated below (at 2010-2014) we conclude that even assuming *arguendo* that the Belle Terre ordinance had a legitimate objective, the means adopted cannot be justified under this standard.

scrutiny in cases in which the compelling state interest test is not invoked serves to render the Equal Protection Clause effective rather to permit all but egregious inequalities to go unchecked, as was sometimes the case under the minimal scrutiny test. This approach is particularly appropriate in cases of the present type, where individual human rights of groups as opposed to business regulations are involved. See United States v. Carolene Products Co., 304 U.S. 144, 152-153 n. 4, 58 S.Ct. 778, 82 L.Ed. 1234 (1938); Tussman & tenBroek, *supra* at 373.

[17] Turning to the question of whether the Belle Terre ordinance may be sustained upon application of the foregoing principles, we start by examination of the sole ground upon which it was upheld by the district court, namely the interest of the local community in the protection and maintenance of the prevailing traditional family pattern, which consists of occupancy of one-family houses by families based on consanguinity or legal affinity. In our view such a goal fails to fall within the proper exercise of state police power. It can hardly be disputed—and the district court so found—that the ordinance has the purpose and effect of permitting existing inhabitants to compel all others who would take up residence in the community to conform to its prevailing ideas of lifestyle, thus insuring that the community will be structured socially on a fairly homogeneous basis. Such social preferences, however, while permissible in a private club, have no relevance to public health, safety or welfare. See Kirsch Holding Co. v. Borough of Manasquan, 59 N.J. 241, 281 A.2d 513 (1971); City of Des Plaines v. Trottner, 34 Ill.2d 432, 216 N.E.2d 116 (1966); cf. Moreno

v. U. S. Dept. of Agriculture, 345 F.Supp. 310 (D.D.C.) (three-judge court) (per McGowan, Cir. J.), prob. jur. noted, 409 U.S. 1036, 93 S.Ct. 526, 34 L.E.2d 485 (1972).

[18] The effect of the Belle Terre ordinance would be to exclude from the community, without any rational basis, unmarried groups seeking to live together, whether they be three college students, three single nurses, three priests, or three single judges. Although local communities are given wide latitude in achieving legitimate zoning needs, they cannot under the mask of zoning ordinances impose social preferences of this character upon their fellow citizens. To permit such action would be to invite, upon similar guise, zoning laws that would restrict occupants to those having no more than two children per family, those employed within a given radius, those earning a minimum income, or those passing muster after interview by a community "Admissions Committee." While such selective exclusion may be practiced by private institutions, it cannot be tolerated on the part of a governmental body such as Belle Terre, which is bound to serve the public.

Even assuming *arguendo* that a social predilection in the form of entrenched traditional family units constituted a valid zoning objective, we fail to find a shred of rational support for the means used here to achieve that end. It is not suggested that appellants or unrelated groups functioning as a single housekeeping unit, endanger the health, safety, morals or welfare of existing residents of the community. The most that can be said is that they differ from existing residents solely because of lack of blood or marriage ties.

[19] Appellees urge that regardless whether social preferences may or may not form a valid basis for upholding the ordinance, it should nevertheless be sustained on the ground that it has a rational basis in traditionally recognized zoning objectives. It is suggested, for instance, that the ordinance is justified as a means of controlling population density. This contention is based on the assumption that the number of related persons in the conventional family unit (husband, wife, brothers, sisters, children, nephews, uncles, grandparents) tends to be "self-limiting," whereas in the absence of a regulation limiting the number of unrelated occupants, the "voluntary" family can be limitless in size. Another argument advanced by appellees is that the ordinance might avoid escalation of rental rates, which would price traditional families out of the market, since it is possible that unrelated groups would be willing to pay higher rentals than would consanguineal families. We are further asked to speculate that "voluntary" families would pose greater parking, traffic and noise problems than would traditional families and that there would be a greater degree of transiency on the part of the former than the latter, thus weakening the stability of the community.

If some or all of these hypothesized objectives were supportable, some form of such ordinance might conceivably be upheld as a valid exercise of state police power. Upon the record before us, however, we fail to find a vestige of any such support. To theorize that groups of unrelated members would have more occupants per house than would traditional family groups, or that they would price the latter out of the market or produce greater parking, noise or

traffic problems, would be rank speculation, unsupported either by evidence or by facts that could be judicially noticed. We are here constrained to adhere to Judge Dooling's observation that "Such a restricted zoning district might well be all but impossible to justify if it had to be strictly justified by its service of such familiar zoning objectives as safety, adequate light and air, preservation of the lands from overintensive use, avoiding crowding of the population, reduction of traffic congestion and facilitation of adequate transportation, water, sewerage, school, park and other public services."

> "In terms of permissible zoning objectives, a group of persons bound together only by their common desire to operate a single housekeeping unit, might be thought to have a transient quality that would affect adversely the stability of the neighborhood, and so depreciate the value of other property. An ordinance requiring relationship by blood, marriage or adoption could be regarded as tending to limit the intensity of land use. And it might be considered that a group of unrelated persons would be more likely to generate traffic and parking problems than would an equal number of related persons.
>
> "But none of these observations reflects a universal truth. Family groups are mobile today, and not all family units are internally stable and well-disciplined. Family groups with two or more cars are not unfamiliar. And so far as intensity of use is concerned, the definition in the present ordinance, with its reference to the 'respective spouses' of persons related by blood, marriage or adoption, can hardly be regarded as an effective control upon the

size of family units." City of Des Plaines v. Trottner, 34 Ill.2d 432, 434, 216 N.E.2d 116, 119 (1966) (per Justice Schaefer).

Even if the Belle Terre ordinance could conceivably have a legitimate zoning objective, the classification established, may well be vulnerable as too sweeping, excessive and over-inclusive. See Kirsch Holding Co. v. Borough of Manasquan, 59 N.J. 241, 281 A.2d 513 (1971); cf. Developments in the Law—Equal Protection, 82 Harv. L.Rev. 1065, 1082-1087 (1969). For instance, if it were aimed at maintaining population density at the level of traditional family units, it would not limit the number of unrelated occupants to two (2) persons per one-family dwelling, which admittedly is smaller than the size of the average family. Assuming such a purpose, a more permissive ordinance would suffice. Furthermore, such an objective could be achieved more rationally and without discrimination against unrelated groups by regulation of the number of bedrooms in a dwelling structure, by restriction of the ratio of persons to bedrooms, or simply by limitation of occupancy to a single housekeeping unit. Public and private nuisance laws should provide an adequate remedy to curb noise or other forms of pollution on the part of occupants of a dwelling, regardless of their relationship to each other.

If the objective of the ordinance were to avoid rent inflation, the simple remedy would be adoption of rent controls rather than the exclusive of a class of people from the community. Lastly, disregarding the absence of evidence to support the suggestion that the ordinance might constitute

a means of controlling traffic, parking or noise, there exist a wide variety of local legislative enactments by which these objectives could be accomplished without impinging upon the rights of privacy and association of unrelated persons. If a problem of excessive automobiles existed, it could be met simply by restricting the number of cars per dwelling unit, regardless of the relationship of its occupants.

[20, 21] Nor are we persuaded to sustain the Belle Terre ordinance by the fact that dormitory housing is available to appellants at Stony Brook or one-family housing available in other nearby communities which have not enacted exclusionary zoning of the type here under attack. The fact that an unconstitutional ordinance is limited in geographical scope does not make it any less an abridgement of guaranteed constitutional rights. See Buchanan v. Warley, 245 U.S. 60, 38 S.Ct. 16, 62 L.Ed. 149 (1917); Murdock v. Pennsylvania, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943). Appellants are entitled, subject to lawful and reasonable local laws, to travel and settle down where they please. See King v. New Rochelle Municipal Housing Authority, 442 F.2d 646, 648 (2d Cir. 1971); Cole v. Housing Authority, 435 F. 2d 807 (1st Cir. 1970), affirming 312 F.Supp. 692 (D.R.I.1970). If Belle Terre is permitted to exclude appellants from its borders, other nearby communities, in the absence of a coordinated, enforceable regional plan, may be expected to do likewise. Indeed, many already have.[9] The

[9] See, e.g., Building Zone Ordinance of Village of Babylon, Art. I, § 100(28); Building Zone Ordinance of Village of Sag Harbor, Art. II, § 1(d); Ordinances of the Village of Bellport, Ch. 10, Art. II, § 206.1; Zoning Ordinance, General Regulations of Town of East Hampton, § 309.5; Unified Code of Ordinances, The Village of Oldfield, Art. VII, Ch. 7, Zoning, Part. 7.2.

availability of housing and other community, therefore, does not constitute a defense. Carried to its logical conclusion such an argument might, after all local communities in an entire area had adopted unjustifiable exclusionary zoning laws, relegate those discriminated against, in this age of the jet plane and superhighway, to distant regions or even to other states.

Lastly we note that in most cases similar zoning classifications have been found invalid. See City of Des Plaines v. Trottner, 34 Ill2d 432, 216 N.E.2d 116 (1966); Kirsch Holding Co. v. Borough of Manasquan, 59 N.J. 241, 281 A. 2d 513 (1971). In an analogous context a three-judge court has struck down a legislative classification which limited eligibility for food stamps to "related" individuals living as one economic unit sharing common cooking facilities and excluded groups of unrelated individuals similar to appellants here. Moreno v. United States. Dept. Agriculture, 345 F.Supp. 310 (D.D.C.), prob jur. noted, 409 U.S. 1036, 93 S.Ct. 526, 34 L.Ed.2d 485 (1972). We find Palo Alto Tenants Union v. Morgan, 321 F.Supp. 908 (N.D.Cal.1970), relied on by appellees, to be unpersuasive. Although the court there upheld a similarly defined "single family" zoning ordinance under restrained equal protection scrutiny, it also found, unlike the district court here, that the ordinance was rationally related to population density control, traffic control and maintenance of lower rental rates.

CONCLUSION

[22] The discriminatory classification created by the Belle Terre ordinance does not appear to be supported by any rational basis that is consistent with permissible zoning objectives. Since appellants have shown a strong likelihood of success on the merits and the balance of hardships tips decidedly in their favor, the prerequisites for preliminary injunctive relief have been established. Checker Motors Corp. v. Chrysler Motors Corp., 405 F.2d 319 (2d Cir.), cert. denied, 394 U.S. 999, 89 S.Ct. 1595, 22 L.Ed.2d 777 (1969).

Accordingly the order of the district court is reversed and the case remanded for further proceedings consistent with this opinion.

TIMBERS, Circuit Judge (dissenting):

The Village of Belle Terre, a community of 700 people, has enacted a "one-family" zoning ordinance similar to those in effect in thousands of communities throughout the Nation. Six unmarried students—three males and three females—at the State University of New York at Stony Brook, claiming that they constitute "one-family", have leased a house in Belle Terre for the purpose of living there together. The Village says its one-family ordinance prohibits such a group living there. The students, in their civil rights action brought in the district court below, challenge the constitutionality of the ordinance. After a hearing in the district court, Judge Dooling, in a most thoughtful and perceptive opinion, — F.Supp. — (E.D.N.Y. 1972), upheld

the validity of the ordinance and denied a preliminary injunction against its enforcement. The majority in our Court today reverses the district court and strikes down the Village's zoning ordinance on the ground that it violates the equal protection clause of the United States Constitution. I disagree.

First, while I recognize that the Supreme Court appears to be casting aside the rigid old equal protection-new equal protection dichotomy, I believe that the majority in our Court incorrectly perceives the essence of the new standard being developed. Since our decision will have radiations far beyond the immediate controversy, I feel compelled to state my understanding of the Supreme Court's latest equal protection decisions and the new standard of judicial review that they require.

Secondly, I disagree with the majority on the merits of the instant controversy. In my view since the Belle Terre zoning ordinance bears a significant relationship to the traditionally recognized zoning objectives asserted by appellees, it satisfies the new equal protection standard.

I.

In the century that has passed since the equal protection clause became part of our Constitution, two well-defined equal protection standards have been established: the "minimal scrutiny" standard and the "strict scrutiny" standard.

A good definition of the "minimal scrutiny" standard or test was articulated by Chief Justice Warren in McGowan v. Maryland, 366 U.S. 420, 425-26 (1961):

> "[The equal protection clause] permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. . . . A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

This deferential test, also known as the "old equal protection", was utilized most often where economic or social legislation was being challenged. See, e.g. Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911).

The "strict scrutiny" test involved a more intense and interest-balancing review of legislative means and ends. It required that the governmental purpose for legislation be "compelling" and that the intrusion upon individual rights caused by a legislative classification be "necessary" to the effectuation of this "compelling" purpose. See Shapiro v. Thompson, 394 U.S. 618 (1969). This interventionist test, also known as the "new equal protection", was applied where a classification provided for differential treatment on the basis of race, Loving v. Virginia, 388 U.S. 1 (1967), or where a neutral classification in fact adversely affected the fundamental rights of a disadvantaged group. See Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (voting rights); Griffin v. Illinois, 351 U.S. 12 (1956) (right to an effective criminal appeal); Shapiro v. Thompson, *supra* (right of interstate travel).

Appendix A—Opinion of the Court of Appeals for the Second Circuit

The majority here asserts that certain recent decisions of the Supreme Court[1] indicate that a third standard of review—an equal protection standard of intermediate scrutiny—is in the process of evolution. This standard is described by the majority as "a more flexible and equitable approach, which permits consideration to be given to evidence of the nature of the unequal classification under attack, the nature of the rights adversely affected, and the governmental interest urged in support of it." The test proposed by the majority is that "[i]f the classification, upon review of facts bearing upon the foregoing relevant factors, is shown to have a substantial relationship to a lawful objective and is not void for other reasons, such as overbreadth, it will be upheld." The majority further states that under the new test courts are "asked to do what courts are historically suited to do—apply the law to factual contexts rather than accept one hypothetical legislative justification to the exclusion of others that represent the true rationale of the classification." I believe that the intensity and focus of judicial review required by the decisions cited by the majority differs substantially from the intensity and

---

[1] The majority relies primarily upon five decisions to support its formulation of a new rationality standard: James v. Strange, 407 U.S. 128 (1972); Jackson v. Indiana, 406 U.S. 715 (1972); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972); Eisenstadt v. Baird, 405 U.S. 438 (1972); Reed v. Reed, 404 U.S. 71 (1971). Additional decisions might be cited to indicate that the Court recently may have been developing a third standard of review: Chicago Police Dept. v. Mosley, 408 U.S. 92 (1972); Humphrey v. Cady, 405 U.S. 504 (1972). See generally Gunther, The Supreme Court 1971 Term, Foreword, In Search of Evolving Doctrine on a Changing Court: A Model for A New Equal Protection, 86 Harv. L. Rev. 1 (1972).

focus of the test proposed by the majority and applied by the majority to the present controversy.

James v. Strange, 407 U.S. 128 (1972), a unanimous decision, probably is the best example of the Court's new policy of judicial intervention without "strict scrutiny". That decision held unconstitutional a Kansas statute for recoupment of legal defense fees expended for indigent defendants. What the Court found offensive about the statute was that a debtor in a recoupment action could not avail himself of a number of protective exemptions—including some restrictions on wage garnishment—afforded to other civil judgment debtors. It held that the distinction between these debtors and other civil judgment debtors with regard to the exemptions violated the equal protection clause recause it was not based on "some rationality".

In Jackson v. Indiana, 406 U.S. 715 (1972), the Court held that the state's provisions for pretrial commitment of mentally incompetent criminal defendants violated the equal protection clause. A comparison of the commitment laws applicable to a criminal defendant with those governing commitment of persons not charged with offenses disclosed that criminal defendants were subject to more lenient commitment standards and to a more stringent release standard. Accepting as legitimate the proffered state objective in committing criminal defendants, the Court decided that the difference between commitment procedures was not supported by any rational basis related to this objective.

Weber v. Aetna Casualty and Surety Co., 406 U.S. 164 (1972), invalidated a statute which discriminated between

legitimate children and dependent, unacknowledged legitimates in awarding workmen's compensation benefits for the death of a common father. The Court held that the discrimination against illegitimates bore "no significant relationship to those recognized purposes of recovery which workmen's compensation statutes commendably serve." 406 U.S. at 175.

The two decisions chiefly relied upon by the majority here, Eisenstadt v. Baird, 405 U.S. 438 (1972), and Reed v. Reed, 404 U.S. 71 (1971), strike me as not truly illustrative of the intensity and focus of review associated with the evolving equal protection standard. In both *Baird* and *Reed*, the Court did specify that the test being applied was a means-scrutiny test; whether the means actually were rationally related to a valid public purpose. But the actual scrutiny engaged in by the Court in each case seems more intense than required under the means-scrutiny test as defined.

In *Reed*, the Court held unconstitutional an Idaho probate provision which gave men a mandatory preference over women when persons of the same priority class applied for appointment to administer a decedent's estate. Chief Justice Burger found "some legitimacy" in the state's proffered objective to simplify probate proceedings. Yet in testing the means solely as related to that aim the Court held that the sex classification was "arbitrary". It seems clear that the means did contribute substantially to the state's purpose, and that the rationality test was met. The more intense review engaged in by the Court, more charac-

teristic of the strict scrutiny test than of the new rationality test, apparently reflected an unexpressed special suspicion of sex classifications.

In *Baird*, the Court struck down Massachusetts, ban on the distribution of contraceptives to unmarried persons. The Court reached this result, however, by scrutinizing the legislation far more vigorously than it would have under the means-scrutiny standard. It rejected, as appropriate measures of the rationality of the means, two of the purposes in fact asserted by the state. The only purpose it found credible was a ban on contraceptives as such. It then stated that a distinction between married and unmarried persons was not rationally related to this objective. The Court appears to have reached a judgment as to the legitimacy of the ends by measuring their value against the individual interests affected. Since the interests involved were closed related to those protected in Griswold v. Connecticut, 381 U.S. 479 (1965), the Court was justified in subjecting the statute to intense scrutiny.

The *James*, *Jackson* and *Weber* decisions clearly indicate that the Court is not content with the two-tier equal protection doctrine and they may well presage a new equal protection standard.[2] Such standard would require modest intervention by a court to assure rationality of legislative means but without restricting legislative prerogatives re-

[2] Four decisions rendered by the Court last term indicate that it is not yet ready to abandon the "old equal protection" standard. Jefferson v. Hackney, 406 U.S. 435 (1972); Lindsey v. Normet, 405 U.S. 56 (1972); Schill v. Knebel, 404 U.S. 357 (1971); Richardson v. Belcher, 404 U.S. 78 (1971).

garding ends. Unlike the "strict scrutiny" test, the importance of the governmental interests apparently would not be weighed against the importance of the private interests impaired by the legislation. Courts would not defer to a broad range of imaginable legislative purposes, but if the ends proffered by the state were legitimate, and no right or value which has clear support in constitutional text and history were adversely affected, conflicting values would not be required to be weighed. The inquiry thus would be scrupulously focused on means rather than ends.

The majority here states that "the nature of the right affected" should in part determine the rationality of the means. This indicates that the more "valuable" the right affected, the more intense should be the scrutiny and the more rational must be the means to achieve the objective. I do not find any support for this principle in the Supreme Court cases. In each of the decisions, except *Reed* and *Baird*, the intensity of review was of the same degree although the interests affected were different. A "sliding scale" approach may be appropriate in some contexts, but it seems to me to be inappropriate here. A court should not be required to attempt the impossible task of first assessing the precise value of a right or interest[3] and then increasing or decreasing the intensity of its scrutiny ac-

[3] The difficulty in judging the relative value of an interest is illustrated by the Court's hesitancy in expanding the list of "fundamental interests". See, e. g., Lindsey v. Normet, 405 U.S. 56 (1972) (refusal to find housing a fundamental interest). Indeed, the Court's use of the new means-scrutiny test may be viewed as a technique to avoid the troublesome value judgments required to identify new fundamental interests.

cordingly. This approach would confer upon a judge wide discretion to overturn state and local legislation based largely on his own estimate of the value of competing interests—a highly abstract and individualistic determination.

The recent Supreme Court decisions, in my view, require a judge to make only the narrow value judgments needed in evaluating means. A legislative classification must contribute substantially to the achievement of the state's purpose. It must "rest on a ground of difference having a fair and substantial relation to the object of the legislation." Reed v. Reed, *supra*, 404 U.S. at 76. This would indicate that grossly overinclusive or underinclusive classifications should not be readily tolerated. Nor should a reviewing court defer to imaginable facts that might justify the classification. But account should be taken of legislative realities and the need for legislative flexibility. In short, a legislature should be able to adopt any means that are reasonably effective in achieving a valid legislative end or ends.

II.

The Belle Terre ordinance clearly was not devised, nor has it been enforced, so as to discriminate against any group because of its racial, religious, or political characteristics. Reitman v. Mulkey, 387 U.S. 369 (1967). It does not operate to exclude the indigent from the Village. Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (2 Cir. 1968). Appellants have not shown infringement of a constitutional right to freedom of associa-

tion, NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958), or a right of privacy. Griswold v. Connecticut, 381 U.S. 479 (1965). While appellants' rights to live together under the same roof free from the intrusion of government are said to be important, in my view such rights do not rise to the status of "fundamental interests". In short, the "strict scrutiny" standards should not be applied to test the validity of the ordinance.

The majority believes that the new rationality test should be applied to zoning ordinances such as the Belle Terre ordinance. To me, it is not clear, however, that the Supreme Court is prepared to apply this invigorated rational basis for review to traditional "hands-off" areas of legislative activity. And I have my doubts that we should do so under our own steam. During this last term, the Supreme Court continued its reluctance to explore the welfare area when it found minimal rationality after examining legislation which discriminated in the allocation of welfare funds. Jefferson v. Hackmen, 406 U.S. 535 (1972); Richardson v. Belcher, 404 U.S. 78 (1971). See also Dandridge v. Williams, 397 U.S. 471 (1970). In the past, zoning has been another area which the Court traditionally has declined to explore. Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). I therefore am more disinclined than is the majority to apply an intensified means-scrutiny test to this unchartered area of the law.

For discussion purposes, however, I shall assume arguendo that the new standard of review should be applied to the Belle Terre ordinance.

Appendix A—Opinion of the Court of Appeals for the Second Circuit

The Village of Belle Terre asserts that the primary purpose of its zoning ordinance is to maintain the one-family residential character of the Village for the welfare of its residents. The majority holds that this is not a valid zoning objective and, further, that the ordinance is not a rational means of achieving that objective. While I find it unnecessary to decide this difficult issue, because the ordinance is rationally related to other well-accepted zoning objectives, the majority's treatment of the subject deserves some discussion.

I believe that under the circumstances here the maintenance of the traditional family character of the Village arguably is a legitimate objective. It may be doubtful whether a local government in preplanning the development of a community could set aside an area solely for single-family dwellings with "family" defined as persons related by consanguinity or legal affinity, or as not more than two unrelated persons. But that is not the case here. The Belle Terre ordinance apparently was enacted for the purpose of zoning for a particular neighborhood character in a community that had always been of that character. The development decision was made over a period of time by the families moving into the Village. The zoning ordinance therefore merely reinforced the sum of many individual choices. See Mandelker, Managing Our Urban Environment 707 (2d ed. 1971).

It is significant also that appellants have available to them similar housing in nearby areas. In assessing the legitimacy of a use limitation upon a particular area, a

court should not ignore a relevant, larger pattern of development. As Judge Dooling stated below:

> "The safeguard against mistaking the effect of a particular ordinance is to see it in its total setting, recognizing that its effect, and, therefore, its validity, may be influenced by the way in which neighboring communities are zoned." — F.Supp. at —.

If the zoning ordinance of a small community is viewed from this broader perspective, its maintenance of a particular neighborhood character may not be seen as an expression of a parochial and exclusionist attitude, but instead as the proper use of the general welfare power to establish one segment of a beneficial larger scheme. A look at the entire Brookhaven area, which provides for varying uses and activities, indicates that Belle Terre's ordinance was a proper exercise of the general welfare power.

Certainly the ordinance is rationally related to this objective. The Village reasonably determined that two unrelated persons living in the same household would not substantially change the character of the neighborhood. Whether the limit should have been three or four unrelated persons, is a matter on which the Village is entitled to some flexibility. The limitation clearly contributes to the objective of preserving a family neighborhood.

In addition to the objective of preserving the traditional family character of the neighborhood, the Village has specified several other purposes of the ordinance: (1) to control population density; (2) to avoid escalation of rental rates; and (3) to prevent parking, traffic and noise prob-

lems. These purposes admittedly are not the primary purposes of the ordinance, but I believe that our inquiry should not be limited to its primary purposes. Subsidiary purposes also may support the rationality of a means.

Judge Dooling observed that the ordinance "might well be all but impossible to justify if it had to be strictly justified by its service of such familiar zoning objectives" as those noted above. He did not decide whether the ordinance bore a significant relationship to these objectives. In my view, the ordinance is rationally related to each of these ends. I am reinforced in this view by the decision in Palo Alto Tenants Union v. Morgan, 321 F.Supp. 908 (N.D. Cal. 1970), which upheld a zoning ordinance almost identical to the Belle Terre ordinance.[4]

---

[4] In *Palo Alto*, the court upheld a zoning law which maintained a "single family residential" neighborhood. "Single family" was defined as persons related by blood or law, or a group not exceeding four persons living as a single housekeeping unit. The law was challenged by a group of more than four unrelated persons on the ground that it violated their rights of association and privacy. Applying the restrained "minimal scrutiny" test, the court held that the classification was rationally related to control of population density, avoidance of rent inflation, and prevention of parking, traffic, and noise problems.

The cases relied upon by appellant, City of Des Plaines v. Trottner, 34 Ill. 2d 432, 216 N.E. 2d 116 (1966), and Kirsch Holding Co. v. Borough of Manasquan, 59 N.J. 241, 281 A. 2d 513 (N.J. Super. 1971), are not persuasive. In *City of Des Plaines* the court never reached the equal protection issue because it decided that the zoning law was ultra vires. In *Kirsch Holding Co.*, the ordinance was declared unconstitutional after the court found that its objective was to prevent obnoxious behavior by persons renting during a particular season. The court held that the ordinance limiting the area to "families" was not rationally related to this objective.

Appendix A—Opinion of the Court of Appeals for the Second Circuit

The ordinance here involved obviously provides some controls over density by limiting the number of unrelated persons who may live in a single dwelling. It is argued, however, that the restriction is arbitrary because no corresponding limit is placed on the number of related persons living in a single dwelling. But traditional families do tend to be self-limiting, as the average size of a Belle Terre family (3 persons) demonstrates. Moreover, the Village has an interest in preserving the integrity of the biological or legal family and any discrimination against a large family might run afoul of the Constitution. Cf. Griswold v. Connecticut, *supra*. In short, while the ordinance is not perfectly efficient, it is highly effective, given the realities of the situation. While there may be other, and perhaps more effective, means of curbing population density, the Village should be permitted to select any means that substantially further the legislative purpose. The ordinance in question clearly does so. The majority's observation that other methods of density control are available which are less intrusive upon appellants' rights strikes me as reminiscent of the "strict scrutiny" test which in my view is inapplicable here.

The ordinance also is rationally related to the avoidance of rent inflation. Large groups of unrelated persons typically have several independent sources of income while a traditional family usually has only one basic source of income. Large groups therefore are willing and able to pay a higher rent than could a family. Thus, the whole rent structure of Belle Terre may well be affected by opening the area to large, unrelated living groups. Single families

who rent may be force to move out of the area when their landlord increases the rent to a level he knows large unrelated groups can and will pay. Perhaps rent controls would have been a better solution, as the majority suggests; but the rationality test does not demand that the means employed be the best means available. The restriction on the number of unrelated persons who may live in a single dwelling bears a significant relationship to rent control.

Finally, the ordinance is related to the prevention of traffic, parking, and noise problems. These problems occur when one-family homes become occupied by large groups of unrelated persons. There are likely to be more people and more motor vehicles.

The majority holds that the ordinance is not rationally related to these objectives for three basic reasons: (1) there was no evidence presented that groups of unrelated persons are always different from traditional families with respect to these problems; (2) there were more effective methods available to the Village to solve these problems; and (3) there were methods at least equally effective available to the Village which would have been less intrusive upon appellants' rights.

The Village need not establish that there *always* is a difference between unrelated groups and families with respect to these problems. It is enough that such differences usually exist. I believe that the Village has established that fact. Moreover, since the majority applies a new standard which requires proof by the Village of rationality, and the Village apparently did not anticipate such a standard, at

the very least it seems to me that a remand should be ordered to allow the Village an opportunity to prove these matters.

The fact that the means selected by the Village may not have been the most efficient or the least intrusive of those available is legally immaterial under the means-scrutiny test. If the means selected contributes substantially to the end, the equal protection clause has not been violated. It is not our function to engage in such intense review of legislation unless the classification is suspect or a fundamental interest is adversely affected.

I would affirm the judgment of the district court.

ON DENIAL OF REHEARING EN BANC

A poll of the judges in regular active service having been taken at the request of such a judge as to whether this action should be reheard en banc and there being no majority in favor thereof, it is

Ordered that rehearing en banc is denied. Chief Judge FRIENDLY and Circuit Judges HAYS, MULLIGAN and TIMBERS dissent.

Appendix A—Opinion of the Court of Appeals for the Second Circuit

TIMBERS, Circuit Judge (dissenting from denial of reconsideration en banc):

TIMBERS *opinion.*

In view of the unusual circumstances under which en banc reconsideration of this case is being denied, I think that in fairness and in the public interest I should state my reasons for dissenting from the denial of en banc reconsideration.

First, in this action involving the right of the 700 residents of the Village of Belle Terre, through their local government, to enact a one-family zoning ordinance, I have already stated in my panel dissent filed February 27, 1973, — F.2d at —, the basis of my disagreement with the decision of the majority in striking down the Village's zoning ordinance on the ground that it violates the equal protection clause. The crux of my disagreement with the majority centers upon its misapprehension of the Supreme Court's most recent equal protection decisions and the new standard of judicial review that they require. Assuming arguendo that the new means-scrutiny equal protection standard (based on a *correct* reading of the Supreme Court's recent decisions) should be applied to the uncharted area of zoning ordinances, then it seems to me that the Belle Terre ordinance is valid, for it bears a significant relationship to long recognized zoning objectives.

Second, the en banc vote here is 4-4. It is another instance, during the period that our Court has consisted of eight active judges, where en banc reconsideration of a substantial question of unusual importance is being denied despite the vote of four of the active judges in favor of en banc[1]—here,

Chief Judge Friendly and Circuit Judges Hays, Mulligan and Timbers.

Third, the decision of the panel majority in the instant case, when read in conjunction with recent decisions of other panels of our Court in Aguayo v. Richardson, 473 F.2d 1090 (2 Cir. 1973), and City of New York v. Richardson, 473 F.2d 923 (2 Cir. 1973), makes it virtually impossible for a district court in this Circuit, or a panel of our Court, to determine what equal protection standard to apply in a case before it.

In Aguayo v. Richardson, we dealt with an equal protection challenge to New York experimental work project programs involving families receiving assistance under AFDC

---

[1] See, e. g., Scenic Hudson Preservation Conference v. FPC, 453 F.2d 463, 494 (2 Cir. 1971) (en banc denied, 4-4), cert. denied, 407 U.S. 926 (1972); Zahn v. International Paper Co., 469 F.2d 1033, 1040-42 (2 Cir. 1972) (en banc denied, 4-3, i. e. 4 in favor of en banc, 3 against), cert. granted, — U.S. — (1973), 41 U.S.L.W. 3441 (U.S. Feb. 20, 1973); United States v. Puco, — F.2d —, — (2 Cir. 1973) (en banc denied, 4-4), slip op. 3295, 3304 (May 4, 1973).

But compare International Business Machines Corp. v. United States and Edelstein, 471 F.2d 507 (2 Cir. 1972) (en banc granted, 5-0, on February 14, 1973), It should be noted that in *IBM*, since three of the active judges were disqualified, the votes of all the remaining five active judges were required in order to en banc the case. See *Zahn, supra*, 469 F.2d at 1042. One of the five active judges concurred in the panel majority opinion. Another of the active judges wrote the panel dissenting opinion. If *either* of these two had voted against en banc, the case could not have been reconsidered en banc. Since *each* voted in favor of en banc, the desire of the other four to reconsider the case en banc was not thwarted. See International Business Machines Corp. v. United States and Edelstein, — F.2d —, — (2 Cir. 1973) (en banc) (Timbers, J., dissenting), slip op. 3375, 3394 (May 8, 1973).

program. We noted the development of a new equal protection standard which we described as either "a replacement for the 'two-tiered equal protection' which many have found unsatisfactory, . . . or as a narrowing of the gap between the tiers." 473 F.2d at 1109. We held that the New York work project program satisfied the new standard because experimentation to determine whether improvements can be made in the welfare system is a legitimate government objective. We rejected a claim that some of the details of the program were arbitrary and unreasonable, noting that " 'when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark.' " 473 F.2d at 1110, quoting Louisville Gas Co. v. Coleman, 237 U.S. 32, 41 (1928) (Holmes, J., dissenting).

In City of New York v. Richardson, we were concerned with an attack upon New York State's requirement that residents of local social service districts contribute to the state public welfare fund on the basis of the number of welfare recipients in the local district. We held that an equal protection claim sufficiently substantial to require the convening of a three-judge district court was stated where it was alleged that the contribution system in effect required New York City residents to finance 74% of the state program where only 45% of the State's residents lived there. We reached this result by applying a new equal protection standard which we described as a "modified" rational relationship test. We observed that the Supreme Court's recent decision indicated that "[t]he two-tiered equal protection

doctrine seems to have begun to give way to a more graduated, sliding-scale test." 473 F.2d at 931.

In the instant *Boraas* case, the majority applied its own version of the new equal protection standard which it described as:

> "[a] more flexible and equitable approach, which permits consideration to be given to evidence of the nature of the unequal classification under attack, the nature of the rights adversely affected, and the governmental interest urged in support of it." — F2d at —, slip op. at 2008.

The majority's decision, striking down a village zoning ordinance which limits the number of unrelated persons who may live in a single dwelling, represents an unusually extensive judicial inquiry into regulation by local government of land use. The majority held that the ordinance was not "*in fact* substantially related" to the well-recognized zoning objectives asserted by the Village to justify its ordinance. *Id.*

In my view, the equal protection standards applied in these three decisions within a period of less than six weeks are highly inconsistent. They demonstrate an urgent need for en banc reconsideration and restatement of the proper equal protection standard to be applied. As Judge Kaufman correctly observed, "the outer boundary of [the equal protection] inquiry remains ambiguous". City of New York v. Richardson, *supra*, 473 F.2d at 931. In an area as vital as this one, we should not allow the equal protection standard to be applied by our Court to remain so uncertain pending still further decisions by our Court or by the Supreme Court.

The district courts in this Circuit are called upon to decide equal protection issues with increasing frequency, and on virtually a day to day basis. It is extremely important that we provide them with immediate useful guidance rather than abandon them to make what they will of recent Supreme Court decisions or, even worse, to confuse them with a series of conflicting decisions of our own. Certainly enough has been said in recent decisions of the Supreme Court to enable us to state with reasonable assurance some general guiding principles. I would do so by granting immediate en banc reconsideration of the instant case.

Finally, the Supreme Court's very recent decision in San Antonio Independent School District v. Rodriguez, —— U.S. —— (1973), 41 U.S.L.W. 4407 (U.S. March 21, 1973), strongly indicates that the traditional minimal scrutiny equal protection standard should have been applied in the instant case.[2] In *Rodriguez*, the Court held that "the traditional standard of review, which requires only that the State's system be shown to bear some rational relationship to legitimate state purposes", should be applied to determine whether a Texas program for financing public education complied with the equal protection clause. —— U.S. at ——, 41 U.S.L.W. at 4419. The Court stated that, because "the Justices of this Court lack both the expertise and the famili-

[2] Both the majority opinion of Mr. Justice Powell and the crucial concurring opinion of Mr. Justice Stewart expressly relied upon Chief Justice Warren's opinion in McGowan v. Maryland, 366 U.S. 420, 425-26 (1961). Mr. Justice Stewart referred to *McGowan* as "[t]his settled principle of constitutional law" and as "a specific application of one of the first principles of constitutional adjudication—the basic presumption of the constitutional validity of a duly enacted state or federal law." — U.S. at —, 41 U.S.L.W. at 4425.

arity with local problems so necessary to the making of wise decisions" with respect to the financing of public education, and because "in such a complex arena . . . no perfect alternatives exist", the Court would not "impose too rigorous a standard of scrutiny." —— U.S. at ——, 41U.S.L.W. at 4419. In short, the Court refused to "intrude in an area in which it has traditionally deferred to state legislatures." State or local decisions regarding limitations on the use of land traditionally have been accorded this same great deference by federal courts for the same reasons a state's handling of public expenditures are not be to disturbed. Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). In the light of *Rodriguez*, it seems to me that a *fortiori* the decision in the instant case, which surely constitutes a substantial interference with a municipality's zoning policies, was erroneous. We should correct this error on our own initiative through en banc reconsideration rather than forcing the Village of Belle Terre to incur the unnecessary expenditure of time and money to obtain what would appear to be sure reversal by the Supreme Court. I do not think the Village of Belle Terre should be compelled to march up the hill for the sake of marching down again, in view of the Supreme Court's decision of a fortnight ago in *Rodriguez*.[3]

For the reasons stated above, I respectfully but most emphatically dissent from the denial of reconsideration en banc.

---

[3] I am mindful, of course, that none of us was aware of the Supreme Court's decision in *Rodriguez* at the time of the en banc poll in the instant case. That is all the more reason for reconsideration en banc now—to harmonize the law of this Circuit with controlling Supreme Court law.

Appendix A—Opinion of the Court of Appeals for the Second Circuit

MANSFIELD, Circuit Judge:

Some statements in the dissent of my distinguished brother Timbers from the Court's denial of an *en banc* hearing [1] call for a reply.[2]

Most members of this Court, including our dissenting brother, have construed certain recent Supreme Court decisions as indicating a trend toward modification or softening of what had previously been interpreted as a rigid, two-tiered Equal Protection doctrine.[3] In my judgment there

---

[1] An *en banc* review was denied pursuant to the provisions of 28 U.S.C. § 46(c) because it was not requested by a "majority of the circuit judges of the circuit who are in regular active service."

[2] *En banc* review adds immeasurably to the expenditure of judicial time, energy and resources on the part of members of this already overburdened Court.

Some idea of this Court's current load of regular judicial business can be gathered from the fact that in the fiscal year 1972 it terminated 1,593 appeals, as compared with 959 appeals disposed of annually five years previously, or an increase of 66%. See Annual Report of the Director of the Administrative Office of the United States Courts for the Fiscal Year 1967, Table B1, page 181, and for the Fiscal Year 1972, Table B1, Appendix A-1. Yet the size of the Court has remained the same, with one judgeship now vacant for almost 17 months.

Nor are *en banced* appeals, with rare exceptions, disposed of expeditiously, since all members of the Court are called upon to participate in the hearing and decision. Experience reveals that the *en banc* process may delay this Court's ultimate decision of an appeal by more than six months.

[3] Aguayo v. City of New York, 2 Cir. 1973, 473 F.2d 1090 at 1108-1110 (per Friendly, Waterman, Hays, C.JJ.); City of New York v. Richardson, 2 Cir. 1973, 473 F.2d 923 at 930-931 (per Kaufman, Lumbard, Mansfield, C.JJ.); Green v. Board of Education, Jan. 29, 1973, Slip Sheet 1723 at 1726-28 (per Feinberg, Lumbard, Mansfield, C.JJ.); Boraas v. Village of Belle Terre, 2 Cir. 1973, — F.2d — (per Mansfield, Oakes, Timbers, C.JJ.).

is no inconsistency between general observations voiced by different panels of this Court, including the majority in this case, on the subject of this apparent trend toward more elasticity in application of the basic principle of Equal Protection. But even if there were some differences in the broad language used by different panels, it would be pointless and unwise to attempt to express a standard in crystallized terms along the lines suggested by the dissent.

An *en banc* hearing would not contribute in any significant way to clarity and coherence in the area of Equal Protection for the reason that in pursuing the elusive quest for standards we are dealing with broad general principles which must be capable of adaption to widely varying factual contexts. Nothing we might say about this proteus-like concept, therefore, could be sufficiently precise to have a binding effect throughout the Circuit in other cases, which would inevitably involve significantly different factors, especially since our views would be expressed by a divided court, with district judges looking primarily to the Supreme Court for ultimate guidance. At no time has the principle of Equal Protection been articulated by the Supreme Court or by ourselves as a "litmus-paper test" or precise rule. Indeed, the Supreme Court's description of "Due Process" in Hannah v. Larche, 363 U.S. 420, 442, 80 S.Ct. 1502, 1514, 4 L. Ed 2d 1307 (1960), as an "elusive concept [whose] exact boundaries are undefinable and [whose] content varies according to specific factual contexts" applies with the same force to Equal Protection. While certainty in the law is a virtue, history discloses that resilience is equally

essential. A certain degree of flexibility in describing Equal Protection must therefore be inevitable.

Nor does the Supreme Court's 5 to 4 decision in San Antonio Independent School District v. Rodriguez, — U.S. —, 93 S. Ct. 1278, 35 L.Ed.2d — (Mar. 21, 1973), alter the foregoing. There the Court, following a well beaten path used in review of certain types of economic discrimination, applied "the traditional standard of review" to state legislation of an essentially economic nature, which was challenged because of its social consequences. Here we are not concerned with commercial legislation but with a local ordinance directed squarely against the personal right of individuals to associate and live together and found by the district court to be "impossible to justify" in terms of "such familiar zoning objectives as safety, adequate light and air, preservation of the lands from over-intensive use, avoiding crowding of the population, reduction of traffic congestion and facilitation of adequate transportation, water sewerage, school, park and other public services." If anything, our decision here is in accord with the Supreme Court's decision in *Rodriguez*. In describing the standard applied by it, the Court there stated that "the Texas scheme must still be examined to determine whether it rationally furthers some legitimate, articulated State purpose" (*id.* at —, 93 S.Ct. at 1288), that "the traditional standard of review . . . requires only that the State's system be shown to bear some rational relationship to legitimate State purposes" (*id.* at —, 93 S.Ct. 1300), and that "[t]he constitutional standard under the Equal Protection Clause is whether the challenged state action rationally furthers a

legitimate state purpose or interest" (*id.* at —, 93 S.Ct. at 1308). These statements not only are consistent with our review but would require us to nullify the Belle Terre ordinance for failure to further any legitimate zoning objective.

This is not, therefore, one of those truly extraordinary cases that warrants review *en banc*. Nor would such a hearing render unnecessary the expenditure of time and money required to determine whether the Supreme Court will agree with our disposition of this case, since a majority of this Court might well agree with the result reached by the majority of the panel and, if it did not, appellants would undoubtedly seek review by the Supreme Court.[4] Belle Terre has open to it a simple and inexpensive solution. It can enact a new ordinance bearing some rational relationship to legitimate zoning objectives.

---

[4] While we feel confident that our views will not be disapproved by the Supreme Court, we would not be so vain as to predict that we are "sure" of its action in this fluid area of the law.

APPENDIX B

Opinion of the District Court for the Eastern District of New York (Reversed see 476 F.2

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

72 C 1030

BRUCE BORAAS, et. al.,

Plaintiffs,

—against—

VILLAGE OF BELLE TERRE, et. al.,

Defendants.

MEMORANDUM INCORPORATING FINDINGS OF FACT AND ORDER

Appearances:

LAWRENCE G. SAGER, Esq. and ARTHUR N. EISENBERG, Esq. (BRUCE J. ENNAS, Esq. and Mrs. SUSAN N. HERMAN [student assistant] Of Counsel)
for Plaintiffs

BERNARD E. GEGAN, *Esq.* (James J. von Oiste, Esq., Village Attorney, Of Counsel)
for Defendants

DOOLING, D.J.

The present action was instituted by Edwin and Judith Dickman, husband and wife, as owners and lessors of a six bedroom one family dwelling located at the intersection of

Appendix B—Opinion of the District Court for the Eastern District of New York

Harbor View Road and Cliff Road in the Village of Belle Terre, and three tenants or occupants of the dwelling. Plaintiff Michael Truman is a twenty-five year old graduate student and teaching assistant at the State University of New York at Stony Brook, who is now in his fourth year of graduate study leading to a doctorate in sociology. He leased the Dickman house from the owners on or about December 1, 1971, for a term ending May 31, 1973 at the rent of $500 a month. Plaintiff Bruce Boraas is twenty-four years old, in his third year of graduate study at the State University at Stony Brook, and is working toward a doctorate in sociology and holds a research assistantship. Plaintiff Anne Parish is twenty-three years old and is a third year undergraduate student at the State University at Stony Brook for the academic year which commences at September of 1972. The defendants are the Village of Belle Terre, an incorporated village, and a municipality under the laws of New York, in Suffolk County, and the Deputy Mayor and the Trustees of the village. The natural person defendants are sued in their official capacities only.

For purposes of the present motion there has not been any direct denial of the principal factual allegations of the complaint, and in general they, with the affidavits submitted on both sides, must be taken at this stage as substantially setting forth the conditions with respect to occupancy of the Dickman house. Plaintiff Boraas has been a resident in the house since about June 1, 1972, and has become a cosigner of an apparently new lease on the same lease terms as that originally signed by plaintiff Truman. He expects

to continue as a tenant until May 1973. Plaintiff Parish has not signed a lease, but a check of hers was tendered and accepted in payment of the rent for July 1972. She has been in occupancy since about June 1, 1972, and expects to continue in the house until the end of the term. Three additional students at Stony Brook are now, or have been until very recently, occupants but not lessees of the house: Franklin Beckman, a graduate student in the fifth year of a sociology doctorate program, who was also a teaching assistant; Michael Miranda who is a graduate student in sociology at Stony Brook but who may not continue in the house; and Leonard Cassara an undergraduate student at Stony Brook who planned to leave the house on or before September 1, 1972.

Each of the students occupies a separate bedroom in the house. The rent is apportioned among them, dinner is a common meal, household and yard-keeping chores are distributed among the occupants, and expenses for groceries, newspapers, telephone, utilities, fuel oil and milk are paid from a common treasury to which all contribute. For present purposes, it is not denied that the plaintiff students are living and cooking together as a single housekeeping unit. They are not related to one another by blood, adoption or marriage. What they have in common is that all are students at the State University at Stony Brook, and, in the case of four of the occupants, they have a common interest in prosecuting studies in sociology as graduate students.

The zoning ordinance of Belle Terre establishes a single district, the "A" Residence District, the boundary of which

is identical with the village boundaries. The ordinance provides that no building or premise shall be used and no building in future erected or altered in the village except for use as a one-family dwelling, for a public purpose area owned and operated by Belle Terre, or for accessory buildings (such as a private garage) used incidentally to a dwelling. The ordinance also provides that the lot area of each one-family dwelling shall be at least one acre with a frontage of 200 feet at the building line, residence buildings to be 60 feet back from the street, side yards to be not less than 35 feet on each side, the rear yards to be 90 feet deep.

The critically important part of the ordinance for present purposes is that part which defines "One Family Dwelling" and "Family." Section D-1.34a defines a one-family dwelling as a detached house consisting of or intended to be used as a residence by one family only as a family is defined in the ordinance, and the Section provides that in no case is a "lodging house, boarding house, fraternity house, sorority house or multiple dwelling" to be classified or construed as a "one-family" building. Section D-1.35a defines "Family" as "one or more persons related by blood, adoption or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants." The Section provides further that a number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit though not related by blood, adoption or marriage shall be deemed to constitute a family.

In early June 1972, the plaintiffs applied for beach privileges and were denied them on the ground that their

residence in the village was illegal and that papers were being prepared against them and their landlord. In mid-July a summons to appear before the Village Justice of the Community Center in Belle Terre was issued on a complaint that the plaintiffs Dickman were leasing, renting or otherwise permitting their premises to be used other than as a one-family dwelling. Later that summons was withdrawn when it was realized that no order to remedy the alleged violation had been issued, served and disobeyed. Under date of July 28th an order to remedy violation was issued to the plaintiffs Dickman, advising them that there existed a violation of Article 3 of the Village Code in that premises were used other than as a one-family dwelling, and the plaintiffs Dickman were directed and ordered to comply with the law and remedy the conditions above mentioned on or before August 3, 1973. The order concluded that failure to remedy the conditions and to comply with the law might constitute an offense punishable by fine, imprisonment or both.

Article 4 Section B-1.12a of the Village Ordinance provides that whenever a building inspector finds a condition in violation of the ordinance he is empowered and authorized and duty-bound to order in writing the remedying of such condition in such manner and within such time as he may specify, and the order must then be served upon the owner, occupant or authorized agent by mail. Under Section B-1.18a failure to correct a condition within 48 hours after receiving the order to do so is deemed a violation of the ordinance, each day constituting a distinct violation. In addition, "any appropriate action or proceeding may be instituted . . . to restrain, correct or abate any violation, or to

prevent the occupancy of any such building . . . or to prevent any illegal act . . . or use in or about such building . . .". Article 8 of the zoning ordinance, in Section N-1.4a, provides that in cases where premises are used in violation of the ordinance any appropriate action or proceeding by legal process or otherwise may be instituted or taken to prevent an unlawful use and to restrain, correct or abate any violative use. The Section also provides that each violation of the zoning ordinance constitutes disorderly conduct, and that those responsible for or implicated in a violation of the zoning ordinance shall be disorderly persons and shall be liable for and pay a penalty not exceeding a hundred dollars or be imprisoned for a period not exceeding 60 days, or both. A separate and distinct offense is deemed committed on each day during or on which a violation occurs or continues.

Plaintiffs seek a preliminary and permanent injunction against the institution of criminal or civil proceedings against them to enforce the ordinance in so far as it prohibits residential occupancy by more than two persons not related by blood, adoption or marriage, and against the taking of any other steps intended to or having the effect of enforcing the zoning ordinance, including withholding normal residential privileges, such as beach privileges. The action also seeks a declaration that the building zone ordinance is unconstitutional.

Plaintiffs charge that enforcement of the ordinance against them denies them equal protection of the law, denies them the right of association secured to them by the First and Fourteenth Amendments, intrudes upon the

sphere of privacy secured to plaintiffs by the constitution and contravenes their right to travel.

The Dickman house is about seven or eight miles from the State University at Stony Brook. Each of the plaintiffs asserts that he or she looked for rental opportunities in the vicinity of Stony Brook and found that "except for University dormitory accommodations, the only rental situations which I could afford were shared residences like the Dickman house. Apartment rentals, when available, were too expensive."

It appears without contradiction that there are at the State University at Stony Brook twenty-seven dormitory buildings located on campus which can accommodate approximately 6,200 students. The accommodations range from single and double rooms to suites which accommodate four to six students in each suite. The supply of on-campus housing facilities so far exceeds the demand that it has been reported that two of the dormitory buildings will not be opened for the academic year 1972-1973. The cost of on-campus housing appears to be around $650 a year for each student, which would appear to be less than the amount apportionable to each student in the Dickman house.

Belle Terre has a population of about 700 persons and there are 220 homes in the village, all of which are one-family dwellings. There are two houses directly opposite the Dickman house, both of which have previously been rented, one house a four-bedroom house is reported to rent for $350 a month furnished, and the other a six-bedroom house is likewise reported to rent at $350 a month.

Appendix B—Opinion of the District Court for the Eastern District of New York

Belle Terre is located wholly within the town of Brookhaven which has a population approximating 250,000. Brookhaven's zoning ordinance in Article 1, Section 85-1 defines a one-family dwelling as a detached building designed for or occupied exclusively by one family doing its own cooking. Family in turn is defined as a single individual doing his own cooking and living upon the premises as a separate housekeeping unit or a collective body of persons doing their own cooking and living together upon the premises as a separate housekeeping unit in a domestic relationship based upon birth, marriage or other domestic bond as distinguished from a group occupying a boarding house, lodging house, club, fraternity or hotel.

It will be seen thus that the plaintiffs do not contend that there are not similar dwelling houses which are available to them nor do they deny that there are apartment houses that they could occupy, or dormitory space. The definition of family used in the Brookhaven ordinance would seem to make one-family houses governed by that ordinance available for occupancy by such groups as plaintiffs' group, and their affidavits do not say, and are plainly not intended to say, that the plaintiff students have been unable to find dwelling houses similar to the Dickman house in communities other than Belle Terre which would be equally or more suitable.

The question then is whether the Belle Terre ordinance is valid insofar as it prohibits plaintiffs' occupancy even though the plaintiff students can locate exactly the type of occupancy which they seek in other communities. That in

turn raises the question whether the Belle Terre ordinance must be examined on the assumption, for purposes of testing its validity, that the one-family dwelling ordinances of all other communities are identical with Belle Terre's so that, if the Belle Terre ordinance is valid, the plaintiff students would be restricted to those areas in which communal types of occupancy are permitted, that is, where fraternity houses, club houses and boarding houses are authorized dwellings.

1. Defendants first raise the question of whether the present action can lie at all, and lie in the Federal Court. It is argued that the case is essentially one to enjoin the enforcement of a criminal statute, and that, in any event, the Court should abstain from interpreting the present ordinance until it has been interpreted by the State Courts. Neither contention appears to be sound. The case is not essentially one to enjoin the enforcement of a criminal statute. The action is one to declare a zoning law invalid and to prevent its enforcement. The case is civil in all of its material dimensions. The criminal sanction for enforcement of the ordinance comes to the rearward, far from the real site of the present action. The criminal sanction resembles the contempt order which can follow from the disobedience of a civil injunction. The occupancy itself herein is not criminal under the ordinance but forbidden; when an order to conform the occupancy to law is issued, it is disobedience of that order which is punishable, not the occupancy as such.

What is here involved is the validity of the order based on the ordinance to bring an end to the alleged violation of

the ordinance. If the ordinance were on its face and concededly valid immediate obedience could be expected and the criminal sanction might well be invoked because of an unwarranted and contumelious failure to obey a manifestly correct order. That is not the present case. Here, a constitutional challenge of substance is opposed to the order to terminate the alleged violation. There is here no contumacious disobedience of a plainly proper order to terminate a violation of a plainly valid ordinance.

No question arises under 28 U.S.C. § 2283 for no case is pending in the State Courts to which the present suit is or could properly be addressed. Rather there is here a direct invocation of the Federal Courts' jurisdiction over cases arising under the constitution and laws of the United States, including the Civil Rights Law, the latter of which obviates the necessity for satisfying the jurisdictional amount requirement. 28 U.S.C. §§ 1331, 1343(3); *Younger* v. *Harris*, 1971, 401 U.S. 37, does not reach the present case. The court there had before it the California Criminal Syndicalism Act which punished as crimes certain advocacies of sabotage, violence and terrorism as a means of accomplishing a change in industrial ownership or control or effecting political change. The plaintiffs in the Federal Court action feared prosecution for conduct which if proved would of itself have transgressed the letter of the criminal law. They sought to reach at once and in the Federal Court the issue of whether or not the statute could still be considered constitutional in the light of all that had occurred since the Supreme Court had considered the statute in *Whitney* v. *California*, 274 U.S. 357. It is not necessary to consider how far *Younger* v. *Harris* has changed the

law as it may have stood immediately before the decision was rendered; it is not in the area with which the present case is concerned. *Mitchum* v. *Foster*, 1972, U.S. , 32 L.Ed. 705, marks the difference. There the application of the State was to close down a book store as a public nuisance; a preliminary order prohibiting continued operation had been issued. The owner of the book store asked a three-judge Federal Court to enjoin further enforcement of the law. Whatever the precise extent of *Mitchum* v. *Foster*, it establishes the jurisdiction of the Federal Courts to entertain such cases under 42 U.S.C. § 1983 as the present one.

The present proceeding is exactly parallel to an Article 78 proceeding (New York Civil Practice Law and Rules, §§ 7801 *et seq.*) in which the validity of an ordinance is challenged. Such cases are conventional civil cases in which the courts reach for decision not only the adequacy of the support for action taken under an ordinance, but also the validity of the ordinance itself. See *Matter of Frantellizzi* v. *Herman*, 2d Dept. 1956, App.Div. 2d 980, 151 N.Y.S.2d 396; *Cf. Matter of Diocese of Rochester* v. *Planning Board*, 1956, 1 N.Y.2d 508, 521-522; *Matter of Westchester Reform Temple* v. *Brown*, 1968, 22 N.Y.2d 488, 494-497; *Matter of Unitarian Universal Church* v. *Shorten*, Nassau Co. 1970, 63 Misc.2d 978, 981, 314 N.Y.S.2d 66, 70. Section 7805 authorizes a stay of administrative action pending judicial review, in proper cases. New York procedural law similarly authorizes the use of the declaratory judgment to reach directly the question of the validity of a zoning ordinance where its meaning and application are clear

but the ordinance is claimed to be invalid in attempting to prohibit a use sanctioned by over-riding public policy and statute. The present action is, thus, strictly the federal alternative, in a federal question context, to such state forms of civil action as are usually invoked to test the validity of an ordinance on the basis of its terms or application, and is not in the nature of an action to enjoin criminal prosecutions.

It is contended that there are present unresolved questions of state law the resolution of which should precede an appeal to the Federal courts, since the resolution of the state law question may render it unnecessary to consider the Federal constitutional question tendered by plaintiffs. The specific argument made is that under New York Village Law Sections 175, 177, the authority of villages to adopt zoning laws is both granted and restricted and that the zoning is not valid zoning unless (Section 175) it is for the purpose of promoting the health, safety, morals, or the general welfare of the community through regulating and restricting the size of buildings, percentage of lot occupied, size of yards, courts and other open spaces, density of population and the location and use of buildings, structures and land, for trade, industry, residential or other purposes. Section 176 of the Village Law authorizes the Village Board of Trustees to divide the Village into zoning districts, and Section 177 requires that regulations respecting use of property within the particular zoning districts shall be made in accordance with the comprehensive plan and shall be "designed to lessen congestion in the streets; to secure safety from fire, panic, floods and other dangers; to promote health and the general welfare; to provide adequate

light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water sewerage, schools, parks and other public requirements."

Counsel point out that *City of Des Plaines* v. *Trottner*, 1966, 34 Ill.2d 432, 216 N.E.2d 116 invalidated a zoning ordinance which created a single family residence district and defined the family so as to require among the members of the occupying family relationship by blood, adoption or marriage, on the ground that the restriction of family to the familiar blood-and-marriage-related family did not serve a specifically zoning objective related to land use, although the City was restricted to such objectives by the enabling legislation. But in so doing the court pointed out that

> ". . . the considerations that the defendants advance to show that the ordinance classification is unreasonable and so violates the due process and equal protection provisions of the Constitution of the United States and the due process clause of the Constitution of Illinois, are relevant in determining whether the legislature has authorized such a classification."

Concluding, after discussing the cases which had considered the validity of blood-relationship limitations in single family dwelling ordinances, the Illinois court stated that the enabling legislation had not specifically authorized adoption of zoning ordinances that penetrated so deeply as the one in question into the internal composition of a single housekeeping unit. The court said finally that

". . . until it has done so, we are of the opinion that we should not read the general authorities that it has delegated to extend so far. Such a reading would generate constitutional questions of the kind suggested by the defendants concerning which we express no opinion."

(The court noted that the trial court had reached and resolved the constitutional issue raised by the defendant, and the court stated that the constitutional question presented was a novel one and the validity of the classification a matter of broad concern throughout the state so that the court did have jurisdiction on direct appeal.)

The New York cases have considered the blood relationship limitations in two aspects; *first*, whether a blood relationship limitation can be read into the expression "family" without being expressed, and *second*, whether the expression, when defined to require a blood relationship, will be given effect.

In the *Matter of Laporte* v. *City of New Rochelle*, 2d Dept. 1956, 2 pp. Div. 2d 710, 152 N.Y.S. 2d 916, *affirmed*, 1957, 2 N.Y.2d 921, it was held that a religious order could erect in a one-family zoning district a building to house sixty male members of a religious community where it was not shown that they did not constitute a single, non-profit housekeeping unit, and the ordinance defined "family" as meaning "one or more persons occupying a dwelling unit as a single, non-profit housekeeping unit". In *City of Schenectady* v. *Alumni Association of Union Chapter*, 3d Dept. 1957, 5 App. Div. 2d 14, 168 N.Y.S.2d 754, the court held that where a city's zoning ordinance provided both a

single-family residence district and a multiple dwelling district, a twenty-three member college fraternity chapter could not take over and occupy what had been a one-family dwelling since a college fraternity of twenty-three resident members was not a single family. The court considered that the ordinary and commonly accepted meaning of "single-family residence" and "one-family dwelling", in the light of the obvious objectives of the zoning ordinance, made the fraternity's approach unrealistic and without merit. The court was helped in its interpretation by the fact that the multiple-dwelling district did permit occupancy of buildings by private clubs, fraternities and lodges. The fraternity had challenged the validity of the ordinance as unconstitutionally discriminatory, and as to inequitable to justify injunctive relief, and the court summarily rejected the argument on the ground that the zoning ordinance had been generally sustained as constitutional in earlier litigation.

More recently in *Town of Henrietta* v. *Fairchild*, Monroe Co., 1967, 53 Misc. 2d 862, 279 N.Y.S.2d 992, the court held that an owner's occupation of a one-family type of building was not permissible, but constituted an occupancy more like that of a boarding house, where it appeared that the landowner was a bachelor and had always had living with him from 3 to 7 young men who were also bachelors (with one exception) of similar occupations to the landowner's and who contributed an aliquot share to the maintenance of the property, its furnishing, food costs, entertainment costs, liquor purchases, etc. The court noted that the landowner himself kept four automobiles on the property, three of which were in running order, and that the

co-occupiers used another three cars in connection with the property. The words of the ordinance "single-family dwelling" were not defined but the term "boarding house" was defined as including any dwelling in which more than three persons individually or as families were housed or lodged for hire with or without meals.

On the basis of these cases it would appear that New York does countenance the use of a single family definition which requires the existence of blood relationship and marriage although its courts have not directly considered the issue of validity either as a matter of interpreting zoning enabling acts or as a constitutional matter. *Abbot House* v. *Village of Tarrytown*, 2d Dept. 1970, 34 App.Div.2d 321, 312 N.Y.S.2d 841, at first reading seems to suggest that a blood relationship requirement would be considered invalid in New York as against a claim to occupy advanced for two groups of siblings living under the care of a married couple substantially in a family style, but the zoning ordinance there in question did permit of non-related groups in one-family zoning districts provided the group was not larger than five in number. Moreover, the occupancy was by a group formed under the provisions of Sections 371 and 374-b of the New York Social Services Law. The court decided the case on the ground that the local zoning ordinance was in conflict with an over-riding state law and policy favoring the care of neglected and abandoned children and exceeded the authority vested in the village. *Abbot House* does not intimate that in any other context such a limitation as the blood-relationship and marriage limitation on one-family occupancy would have been similarly regarded as either invalid or unauthorized.

Appendix B—Opinion of the District Court for the Eastern District of New York

The New York law cannot be said to be unresolved in a sense relevant to the present case. The New York courts have not, indeed, considered the constitutional issues raised by the present plaintiffs in the context of the legality of the blood-relationship and marriage limitations either as a direct constitutional question or as subject matter presenting such serious constitutional problems that it ought to be a factor for weighing in the interpretation of enabling legislation. The New York courts have held that one family dwelling zoning districts can be created, and that the expression in itself does not necessarily exclude what counsel have aptly called "voluntary families" of persons unrelated by blood or marriage, that such interpretation can be placed on the single family dwelling district zoning ordinance if the context indicates that kind of an intention, and that where there is an explicit limitation to marriage-and-blood related families it will be given effect as against "voluntary families" even if the definition also includes parent-child relations created by "adoption". The New York courts have held that a clearcut single-family dwelling ordinance of the related-by-marriage-or-blood type must yield to paramount legislation of the state which plainly overrides it.

The New York courts have gone farther. They clearly recognize that an ordinance cannot stand where it directly excludes a constitutionally protected activity in a region which is the normal sphere of exercise for that activity. Three cases involving places of worship or church-related buildings have made that clear. *Matter of Diocese of Rochester v. Planning Board, supra,* arose on review of the refusal of a zoning authority to grant a variance for the erection of a church building at the center of a one-family dwelling

zoning district. The zoning authority was prepared to authorize building the church at the outskirts of the district, where new building was going on apace, but the court found that so to restrict the location of the church would be to infringe the first amendment liberty of worship. The court was clear that it was the purpose of the occupancy alone that resulted in the court's overruling the determination of the zoning authorities. Similarly in *Matter of Westchester Reform Temple* v. *Brown*, *supra*, the court was satisfied that the refusal to grant a variance to extend an existing church structure would have been unimpeachable administrative action had not the issue been one that involved the demonstrated need for an expansion of the synagogue property structures in question. Again the court held that the fact that the variance was sought in the service of an interest that was constitutionally protected, required the setting aside of zoning authority action which in other contexts would have been thoroughly correct. And finally in Matter of *Unitarian Universalist Church* v. *Shorter*, *supra*, a church-related day care center for children was held to be within New York policy and constitutional protection, and thus could not be excluded from the zoning district from which, but for the constitutionally and policy protected kind of use, it could plainly have been excluded.

Plaintiffs here present no claim of a continuing right of occupancy other than that which flows from their constitutional right to continue in occupancy, and if relegated to the State Courts, they would present exactly the same constitutional contentions there, in the confidence that they

would, under New York law as a matter of Federal constitutional necessity be heard just as they are being heard in the present context and in the present case. Plaintiffs have chosen the federal forum for the hearing and decision of their federal constitutional claims. "Plainly escape from that duty is not permissible merely because State Courts also have the solemn responsibility equally with the Federal Courts of enforcing rights granted by the constitution." *Zwickler* v. *Koota*, 1967, 389 U.S. 241, 248. In the present case a state court decision holding that the ordinance, construed as the village has construed it was beyond the authority granted to the village by the New York Village Law, could apparently be based only on the argument that to hold otherwise would impose on Sections 175 and 177 of the Village Law an unconstitutional interpretation. Any unresolved question of the state law detectable here is, therefore, the federal question differently stated. The issue is the same. *Cf. Wisconsin* v. *Constantineau*, 1971, 400 U.S. 433; *Palo Alto Tenants Union* v. *Morgan*, N.D. Cal. 1970, 321 F.Supp. 908, 910.

2. Analysis of the interests involved is not easy. Certainly families made up of a husband and wife and their children and adopted children have a right of association, a right to be private in their homes, a right to live in a one-family dwelling area, and, all seem to be agreed, a right to live in an area which is restricted to one-family dwellings used and occupied as such. Certainly, and equally, the plaintiff students, and similar student-groups, have an unquestionable right to live together in student groupings, to have their meals together and to share the expenses of

their cooperative living. Certainly their pursuit of study in the same institution, and, at least in principal part, in the same field of study, is an additional interest of association which they are at liberty to promote and enhance by adding to attendance at common classes living together and even studying together. All these interests are legally protected to some extent. Certainly they are interests of association protected from prohibitions, exclusions, and inclusions imposed in form of law that have no warrant in some distant public interest that overrides the public interest manifested in extending the sanctions of legal recognition and protection to the interests of association. In a world in which increasing amounts of land surface are zoned for different sorts of uses the associative interests advance a claim to an appropriate place responsive to the kind of cooperating association that they are and have a right to be. Having associated themselves in groups, a traditional family, or a group of students living together, have each whatever rights of privacy and association can fairly be ascribed to each such group given its nature. That the rights would be identical with those accorded other groups could hardly be expected since they are differentiated and not identical sorts of groups. In the cases of a student group living in a suite in a university dormitory, taking their meals in common or in a house dining room, or a student group living in a university apartment building in which the students provided their own meals and their own rules of domestic conduct, their rights of privacy would have such a contour and be subject to such limitations on privacy, as were appropriate to university life and to the inevitable terms of agreement prevailing between the group and the university.

Presumably the plaintiff students—and similar student groups—by the lease-terms under which they hold, surrendered some of their rights of privacy to the landowner. But whatever rights of privacy they have are free from unwarranted public intrusions and from restrictions upon the exercise of personal rights which amount to intrusions on the privacy to which, as the group that they are, they are entitled. And traditional families, too, have their comparable complex of rights, limited by the nature of the family group and its ambience.

But none of these considerations advances the argument very much. To put it one way, the families of Belle Terre may regard the Dickmans' leasing of their house to the plaintiff students for occupancy by the student group as an intrusion, as an invasion of the villagers' interests of privacy and free association, just as students living in a dormitory or in a university apartment building might resent it as an intrusion upon and an invasion of their rights of privacy and association if the university leased any apartments to casual non-student families of husband, wife and children. The question ultimately posed is whether it is lawful to have a one-family dwelling zoning district which excludes equally small household groups who impose no greater burdens of use on the land, the building or the surroundings than a blood-and-marriage family group on the simple and bare ground that such student groups are not families made up of husband, wife and children.

It goes too far too fast to take as a postulate for further argument that creating such a zoning district denies the right of association to anyone, invades anyone's privacy,

or restricts its enjoyment. Under the Dormitory Authority Act, (Public Authorities Law, Title 4, §§ 1675, 1692) dormitories can be and have been built for the very purpose of permitting students, including married students and their families, to associate. The Authority has the power of eminent domain (§1678[3], and its bonds, property and income are exempt from State taxation (other than transfer and estate taxes) (§1685). The plenitude of State power has been addressed to creating the State University for students to be educated and to live together. Their right of association and appropriate privacy is an assured and endowed reality. Nothing that Belle Terre can or has done can affect student groups except in the peripheral interests of student groups in realizing individual living preferences.

Plaintiffs essentially attack the ordinance on the assumption that it denies to the student group their fundamental rights of association and privacy and as such is an unconstitutional ordinance. If the ordinance was that in purpose or truly had that effect, the case would present no problem. The ordinance, indeed, denies the group the right to be associated in locus of residence with the householders of Belle Terre, and if enough other such ordinances existed, the supposed denial could approach the shape of a reality. But the objective facts do not have that stamp. Whatever the future may hold, there evidently is available to the students similar housing in other communities, and their affidavits do not deny that. They rather say that, if plaintiffs do not occupy the Dickman house, the alternative residences available to them, in addition to dormitory living, which

they reject, are apartments, which are too expensive for them, or other houses just like the Dickman house but in other communities. The thrust of the affidavit is not that just such a lease as the Dickman lease in just such a zoning district as Belle Terre's is their last resort, but rather that there is no reason and no right in their being excluded from the Dickman house with no other effect than to force them to take up residence in an exactly similar house similarly located in another community which has not so narrowly defined its one-family dwelling zoning district. The argument constructed is that if the Belle Terre ordinance is valid, every other community can adopt a similar ordinance and students will be denied the right to live in one-family dwelling districts all over—and be remitted to dormitory living or living in other kinds of zoning districts. Or, to put it in another way, the ordinance must be analyzed in terms of its being a universal one-family dwelling ordinance, since any town or village or city could incorporate similar restrictions into its one-family dwelling zoning district. The ultimate question, then, is whether the State can, without forbidden denial of rights of association and privacy to student groups living in small units under cooperative household arrangements, authorize municipal corporations to adopt zoning ordinances which provide for one-family dwelling areas in which the use of one-family dwellings is restricted to families made up of parents and their children—including adopted children—and the normal extensions of what is the familiar family of tradition, or the nuclear family of today.

The threshold question then becomes, whether there is any legally protectable affirmative interest in the estab-

lishment of even one such zoning district of marriage-and-blood-related families living in single-family dwelling houses. Such a zoning ordinance as Belle Terre's of itself indicates the existence of an interest on the part of such families in establishing a place of association to the exclusion of all other kinds of land uses however attractive, prestigious, or disfavored those other uses are. Such a restricted zoning district might well be all but impossible to justify if it had to be strictly justified by its service of such familiar zoning objectives as safety, adequate light and air preservation of the land from overintensive use, avoiding crowding of the population, reduction of traffic congestion and facilitation of adequate transportation, water, sewerage, school, park and other public services. (*Cf.* Village Law § 177). But such one-family zoning is at the very center of the mainstream of actual zoning goals and goal achievement, coming no doubt under the inclusive health and general welfare objectives. A one-family dwelling zoning district limited to families made up essentially of parents and their children needs no apologia. Such zoning is simply another of countless statutes of bounty and protection with which the states, and all of them, and the Federal government alike aggressively surround the traditional family of parents and their children, reaching from family court laws, through laws of inheritance to tax laws. *Euclid* v. *Ambler Realty Co.*, 1926, 272 U.S. 365, 394, indicated as much in the most important of the early opinions in the zoning field. It may well be that such cases as *Eisenstadt* v. *Baird*, 1972, 405 U.S. 438, and *Mendel* v. *United States Civil Service Commission*, N.D. Cal. 1970,

312 F.Supp. 485, may imply for the future that such a zoning ordinance could not be so applied as to exclude a family group that differed only in that husband and wife, while living together with their children, had not married ceremonially. But that is not the present case, and, as the New York Court of Appeals cases cited above demonstrate, such zoning, although generally valid—arguably—could not be so applied as to exclude a family group of parents and their children on the bare ground that relation by marriage meant relation by ceremonial marriage, if that is an implication of *Eisenstadt.*

Every zoning ordinance, since it selects uses and privileges them, excludes all other uses in the land area covered by the zoning district. In a direct sense, the ordinance impinges upon every person in his freedom to exercise any one or all of the excluded uses. The dwelling district excludes the activities of all persons who have the right to and do make glue, or refine sugar, or run livery stables, or practice medicine, dentistry or architecture. Plainly it does not deny them the right to exercise their callings, but it does deny them the right to do so within the zoning district. Zoning exclusions could, no doubt, be carried to the point of unconstitutional deprivation of right simply by selection. The deprivation may result from overselection, that is, for example, by adding forbidden requirements such as those in *Buchanan* v. *Warley*, 1917, 245 U.S. 60, in which the ordinance provided that whites could not acquire residences on blocks where the majority of the residents were colored, nor colored persons acquire residences on blocks in which the majority of the residents were whites.

Since Belle Terre has but a single zone, the occupancy that plaintiffs desire is wholly excluded from the village. But the village, it was indicated, is only about one square mile in extent, has but 220 houses and no more than 700 inhabitants. The village had the power to zone, and had the power to adopt a single zone, in view of its small size and apparent state of development. It is not claimed that the village was, as it were, gerrymandered into existence so that it could be a single-district village.

There is no overall zoning body with coercive authority to see to it that every lawful land use is provided for. Present provision for coordination of municipal zoning and planning by county planning agencies are somewhat tentative* and county and regional planning boards are authorized and in existence and their powers embrace recommendation to cities, villages and towns of a comprehensive zoning plan (General Municipal Law §§ 239-b, *et seq.*, § 239-d[5]). See also Chapter 24, Unconsolidated Laws, providing for creation of the New York State Urban Development Corporation (§§ 6251-6285) and the New York State Urban Development and Research Corporation (§§ 6301-6325). The Court of Appeals, too, has made it clear that the day of patchwork zoning is closing; *Udell* v. *Haas*, 1968, 21 N.Y.2d 463, emphasized that zoning ordinances have to serve the needs of the community as a whole, that the "comprehensive plan is the essence of zoning," since without it, "there can be no rational allocation of land use". (21 N.Y.2d at 469). The safeguard against mistaking the effect of a particular ordinance is to see it in its total setting, recognizing that its effect, and, therefore, its validity, may be decisively influenced by the way in which neighboring communities are zoned.

There is no obstacle to the plaintiff tenants' obtaining legally similar kinds of property in other communities than Belle Terre. There is no present threat that exclusion from Belle Terre would deny to the plaintiff students the right to live as the group that they are. It may be that, as plaintiffs suggest, other villages, and the Town of Brookhaven, might move in the direction of adopting such a definition of family as Belle Terre has adopted. Should that occur then plainly the facts will have changed and a different case will have been presented than is now presented. But there is no genuine reason to expect such a consequence for it may be that such student groups as plaintiffs', with their ability to pay higher rentals because of their numbers, will be very welcome. It is not, of course, certain that where student groups are accepted, they may not concentrate, so that the plaintiff students would find themselves living in a student area that had become such through conversion of what was before that an area occupied almost exclusively by families made up of parents and their children. But it is somewhat difficult in theory for the plaintiff to object to that as a disfavored consequence without undermining their principal position.

The challenged ordinance does not define and exclude plantiffs' class, that is, groups of students from a single university living together under a common household arrangement that involves the sharing of at least one meal together. It may be that the plaintiff students are a class, and as members of a definable class, the class of student groups wishing to live together as a household, but outside of the precincts of the university, and it may be that they constitute a class with respect to whom legislation may

take a special view and make special provisions. Evidently zoning legislation has to some extent explicitly done so. Other zoning ordinances have been seen, including Brookhaven's, which explicitly take account of "fraternities", including them usually for zoning treatment in a class with other group housing arrangements which are distinguishable from conventional parent and children family groups. Student housing has been for 800 years a distinguishable subject matter for social and governmental concern and solicitude as well as for community and governmental restrictions. Just such arrangements as that which the plaintiff students have made is what in the medieval university of Paris was the *hospitium* and at Oxford the *aula*. Indeed, there is reason to believe that it was out of, for example, the *aulae* of Oxford that the colleges of Oxford evolved and which attracted first charitable and later governmental endowments. See, 6 Cambridge Medieval History, Rashdall, The Medieval University, 559, 574-375, 590; Holmes, Daily Living in the Twelfth Century, 1952 (Repr. 1964), 83; Schachner, The Medieval Universities, 1938 (1962 Repr.), 313, 331-339. Relations between the community and the University, centering often on issues of public order and on economic issues over the local cost of food and housing, have been trying and difficult incidents of a complex set of relationships that have persisted for seven centuries and more. See Schachner, Medieval Universities, *supra*, 189 *et seq.*; *Daly*, The Medieval University, 1961, pp. 190 *et seq.* Obviously student housing, specifically as such and oriented to the idea that students wish to live and learn together, is a matter that has been regarded as impressed with a public interest and has commanded public interven-

tion through the exertion of the power of condemnation and the pledge of the public credit to build housing for students as students and because they are students. The student group as a household unit does from a class having legally protected interests and legally recognized claims on public protection and benefaction. It is idle, after these centuries, to suggest that a student population does not present both a problem and a benefit to the communities in which the student population exists. But for a one-family dwelling house zoning district to fail to include in its embrace the sub-class of student groups which are no larger than is the ordinary parents and children family can hardly be supposed to discriminate against the student group, or to deny it the right to exist, or to infringe its liberties of location. It is inevitable that its liberty of location will be a matter of concern and of sporadic restriction. But in the absence of a showing that the restriction on the student units' liberty of location has advanced to the point at which the student group is forced to the hardly appalling choice between disbanding, or living in a club and fraternity zone, or living together within university precincts, no substantial constitutional question is presented.

The conclusion reached is in result the same as that in *Tenants Union* v. *Morgan, Supra*, 321 F.Supp. 908, but it is not considered that the case may be rested on population density, traffic problems, overloaded parking facilities, and the effect on rentals generally. *Kirsch Holding Co.* v. *Borough of Manasquan*, 1971, 59 N.J.241, 281 Atl.2d 513 reached a different conclusion, and it is plain enough that *Des Plaines* v. *Trottner, supra*, reached a different result. Both opinions consider the issue thoroughly, but appear to

reject the idea that there can be a legally protected affirmative zoning interest in the family made up of married parents and children *qua* just such a family, and the failure to accept that as a proper zoning consideration appears strange and unaccountable. Both opinions are satisfied to assert that certain uses which were no more abusive of the land than family uses and which were legitimate activities could not be zoned out of the area. That analysis appears defective; it seems to fail to take account of the essential nature of zoning as a choice among uses all of which are, in general, lawful activities which the persons normally conducting them have a perfect right to conduct and which cannot be discriminated against. The essence of zoning is that its selection is not regarded as invidiously discriminatory against uses not selected. *Cf. Kort* v. *City of Los Angeles*, C.A. Cal. 1942, 52 Cal. App. 804, 127 Pac2d 66, 70. Zoning presupposes that convenient and fitting locations can be found for every legitimate land use, so that no pursuit of any use is denied, or disparaged.

It follows from what has been said that the motion for a preliminary injunction must be denied. It is accordingly

ORDERED that the motion for a preliminary injunction is denied; the temporary restraining order is continued for five days after the entry of the present order to enable plaintiffs to apply to the Court of Appeals for an injunction pending appeal under Rule 8(a).

Dated: Brooklyn, New York
September 20, 1972

/s/ JOHN F. DOOLING, JR.
U. S. D. J.

APPENDIX C

Judgment Appealed From

(No. 5 5-1-73)

73-1607

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the first day of May, one thousand nine hundred and seventy-three.

Bruce Boraas, Anne Parish, Michael Truman, Edwin Dickman and Judith Dickman,

Plaintiffs-Appellees,

v.

Village of Belle Terre, an incorporated municipality, James Philbin, Mayor of the Village of Belle Terre, Robert Doerr, Deputy Mayor and Trustee of the Village of Belle Terre, Vincent Bove, Trustee of the Village of Belle Terre, Vincent Karwowski, Trustee of the Village of Belle Terre, and Francis Stolm, Trustee of the Village of Belle Terre,

Defendants-Appellants.

Appendix C—
Judgment Appealed From

It is hereby ordered that upon consideration of the motion made herein by counsel for the appellees by notice of motion dated April 16, 1973, for summary affirmance of the order for preliminary and permanent injunctions entered on March 29, 1973, by District Judge John F. Dooling of the United States District Court for the Eastern District of New York or, in the alternative, to refer this action to the Court that heard and decided the action in Docket No. 72-2040 affirmance be and it hereby is granted.

A. DANIEL FUSARO,
Clerk

Before:

HON. HENRY J. FRIENDLY
Chief Judge

HON. PAUL R. MAYS
Circuit Judge

HON. WILLIAM J. JAMESON
District Judge

APPENDIX D

Judgment of the District Court Which Was Affirmed By the Court of Appeals Judgment From Which This Appeal is Taken

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Bruce Boraas, Anne Parish, Michael Truman, Edwin Dickman and Judith Dickman,

Plaintiffs,

—against—

The VILLAGE OF BELLE TERRE, an incorporated municipality, JAMES PHILBIN, Mayor of the Village of Belle Terre, ROBERT DOERR, Deputy Mayor and Trustee of the Village of Belle Terre, VINCENT BOVE, Trustee of the Village of Belle Terre, VINCENT KARWOWSKI, Trustee of the Village of Belle Terre, and FRANCIS STOLZ, Trustee of the Village of Belle Terre.

Defendants.

This cause comes on for hearing upon the application of plaintiffs for a preliminary and a permanent injunction, pursuant to the order and opinion of the United States Court of Appeals for the Second Circuit, entered on February 27, 1973.

The Court has before it the prior submissions of the parties to this action, the aforementioned opinion of the United States Court of Appeals for the Second Circuit, the Court's Memorandum Incorporating Findings of Fact and

Order, of September 27, 1972, and the oral representations made to the Court by the parties to this action in conference on March 26, 1973, to the effect that neither party intends to supplement the evidentiary record now before the Court. And it appearing to the satisfaction of the Court that

(1) Final disposition of this action pursuant to Rule 65(a) (2) of the Federal Rules of Civil Procedure is appropriate, in that neither party intends to supplement the evidentiary record now before the Court; and that

(2) plaintiffs in their Complaint is appropriate and necessary, in that the findings of fact heretofore made and the opinion and order entered by the Second Circuit Court of Appeals in this action on February 27, 1973, necessitate the conclusion that the Building Zone Ordinance of the Village of Belle Terre insofar as it proscribes residential occupancy by more than two persons not related by blood, adoption or marriage is violative of the equal protection clause of the Fourteenth Amendment, and in that irreparable injury will result to the plaintiffs if the criminal or civil proceedings threatened by the Village of Belle Terre pursuant to that ordinance are commenced.

Accordingly, it is

ORDERED AND ADJUDGED that Article I Sections D-1.34a and D-1.35a and Article II Sections DT-1.0, DT-1.1, D.T.-1.2 and Article III Section A-1.0 of the Building Zone Ordinance of the Village of Belle Terre to the extent that such provisions prohibit residential occupancy by more than two persons not related by blood, adoption or marriage within the Village of Belle Terre are hereby declared to be in violation of the United States Constitution. It is further

ORDERED AND ADJUDGED that defendants, their agents, their successors in office, and anyone acting in concert with defendants are hereby enjoined and restrained from instituting civil or criminal proceedings against defendants or in any way enforcing the aforementioned provisions or in any way penalizing plaintiffs pursuant to the aforementioned provisions of the Building Zone Ordinance of the Village of Belle Terre, insofar as such provisions proscribe residential occupancy by more than two persons not related by blood, adoption or marriage. It is further

ORDERED AND ADJUDGED that defendants, their agents, their successors in office, and anyone acting in concert with defendants, are hereby enjoined and restrained from denying to plaintiffs any of the normal rights and privileges of residence within the Village of Belle Terre such as beach privileges.

JOHN F. DOOLING, JR.
U.S.D.J.

DATE:

APPENDIX E

Notice of Appeal to the Supreme Court of the United States

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Civil Docket No. 73-1607

BRUCE BORAAS, ANNE PARISH, MICHAEL TRUMAN, EDWIN DICKMAN and JUDITH DICKMAN,

Plaintiffs-Appellees,

—against—

THE VILLAGE OF BELLE TERRE, an incorporated municipality, James Philbin, Mayor of the Village of Belle Terre, Robert Doerr, Deputy Mayor and Trustee of the Village of Belle Terre, Vincent Bove, Trustee of the Village of Belle Terre, Vincent Karwowski, Trustee of the Village of Belle Terre, and Francis Stolz, Trustee of the Village of Belle Terre.

Defendants-Appellants.

NOTICE is hereby given that the Village of Belle Terre and the individual defendants above named hereby appeal to the Supreme Court of the United States from the final judgment dated May 1, 1973 (Docket No. 73-1607).

This appeal is also intended to bring up for review the judgment of the Court of Appeals in the prior appeal in this action (Docket No. 72-2040), dated February 27, 1973.

Appendix E—Notice of Appeal to the Supreme Court of the United States

This appeal is taken pursuant to 28 U.S.C. Sec. 1254(2).

Dated: May 16, 1973.

Yours, etc.

/s/ JAMES J. VON OISTE, ESQ.,
James J. von Oiste, Esq.,
Village Attorney, Belle Terre,
505 Main Street,
Port Jefferson, New York 11777

To:

LAWRENCE G. SAGER, ESQ.,
New York Civil Liberties Union,
Attorney for Plaintiffs-Appellees,
84 Fifth Avenue,
New York, N.Y. 10011.

/s/ BERNARD E. GEGAN, ESQ.
Bernard E. Gegan, Esq.
Of Counsel,
84 74th Street,
Brooklyn, New Yo[illegible]209

To:

CLERK OF THE COURT,
United States Court of Appeals
For the Second Circuit
United States Courthouse,
Foley Square,
New York, N.Y. 10007